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No. 07-

IN THE

Supreme Court of the United States

ST. JOHN'S UNITED CHURCH OF CHRIST, *et al.*,
Petitioners,

v.

CITY OF CHICAGO, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

RONALD D. ROTUNDA
GEORGE MASON UNIVERSITY
SCHOOL OF LAW
3301 Fairfax Drive
Arlington, VA 22201
(703) 993-8041

CHRISTOPHER T. HANDMAN*
ROBERT E. COHN
DOMINIC F. PERELLA
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5719

*Counsel of Record

Counsel for Petitioners

(additional counsel listed on inside cover)

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Illinois amended a state law to withdraw from one religious group a statutory protection that it continues to offer to all other religious groups in the State. In evaluating a Free Exercise challenge to this law, a divided panel of the Seventh Circuit refused to apply strict scrutiny: It held that the law remained neutral and of general applicability because the State, in treating this religious group differently, was pursuing a secular objective, not a religiously motivated one.

The rule adopted by the Seventh Circuit has been embraced by the First, Fifth, and Ninth Circuits. In contrast, four other Circuits—the Third, Sixth, Tenth, and Eleventh—have held that legislative motivation is irrelevant; a law that singles out religion for unique burdens is categorically not neutral and of general applicability, regardless of whether the law's goals are secular and benign.

The question presented is: Whether the Seventh Circuit correctly held that a law extending a benefit to some religious groups but withholding it from others is neutral and of general applicability simply because "the legislature had [a] nondiscriminatory purpose" in adopting the law.

PARTIES TO THE PROCEEDINGS

Petitioners are St. John's United Church of Christ, Helen Runge, and Shirley Steele. They were plaintiffs in the District Court and appellants before the United States Court of Appeals for the Seventh Circuit.

Respondents are the City of Chicago ("Chicago"), the Federal Aviation Administration ("FAA"), and FAA Acting Administrator Robert A. Sturgell. Chicago, the FAA, and former FAA Administrator Marion C. Blakey were defendants in the District Court and appellees before the United States Court of Appeals for the Seventh Circuit.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

INTRODUCTION 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 12

I. THE RULING BELOW EXACERBATES AN EXISTING CIRCUIT SPLIT 12

A. Four Circuits Hold That Laws Singling Out Religion For Differential Treatment Are Categorically Not Neutral And Generally Applicable 13

B. Four Circuits Have Adopted A Contrary Rule 18

II. THE SEVENTH CIRCUIT'S RULING CONFLICTS WITH THIS COURT'S PRECEDENTS 23

III. THE CASE PRESENTS AN IDEAL VEHICLE TO ADDRESS AN IMPORTANT AND RECURRING QUESTION 30

TABLE OF CONTENTS—Continued

Page

CONCLUSION 32

APPENDICES

APPENDIX A:

Opinion of the Court of Appeals, dated September 13, 2007 ..... 1a

APPENDIX B:

Memorandum Opinion and Order of the District Court, dated November 16, 2005 ..... 64a

APPENDIX C:

Order Denying Rehearing, dated December 4, 2007 ..... 105a

TABLE OF AUTHORITIES

Page

Cases:

Blackhawk v. *Pennsylvania*, 381 F.3d 202 (3d Cir. 2004) 16, 17

Braxton v. *United States*, 500 U.S. 344 (1991) 12

Central Va. Cmty. Coll. v. *Katz*, 546 U.S. 356 (2006) 31

Church of Lukumi Babalu Aye Inc. v. *City of Hialeah*, 508 U.S. 520 (1993) ..... *passim*

Columbia Union College v. *Clark*, 527 U.S. 1013 (1999) 22

Employment Div., Dep't of Human Res. of Or. v. *Smith*, 494 U.S. 872 (1990) ..... *passim*

Fraternal Order of Police Newark Lodge No. 12 v. *City of Newark*, 170 F.3d 359 (3d Cir.), *cert. denied*, 528 U.S. 817 (1999) 16, 17

KDM ex rel. WJM v. *Reedsport Sch. Dist.*, 196 F.3d 1046 (9th Cir. 1999), *cert. denied*, 531 U.S. 1010 (2000) 19, 20

KDM ex rel. WJM v. *Reedsport Sch. Dist.*, 210 F.3d 1098 (9th Cir. 2000) 5, 21, 22

Kissinger v. *Board of Trustees*, 5 F.3d 177 (6th Cir. 1993) 17, 18

Larson v. *Valente*, 456 U.S. 228 (1982) 23

Locke v. *Davey*, 540 U.S. 712 (2004) 27

TABLE OF AUTHORITIES—Continued

Page

Lyng v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) 11

Maislin Indus. U.S., Inc. v. *Primary Steel, Inc.*, 497 U.S. 116 (1990) 32

Midrash Sephardi v. *Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005) 15, 16, 17, 21

Shrum v. *City of Coweta*, 449 F.3d 1132 (10th Cir. 2006) ..... *passim*

Strout v. *Albanese*, 178 F.3d 57 (1st Cir.), *cert. denied*, 528 U.S. 931 (1999) 18, 19, 20

Tenafly Eruv Ass'n, Inc. v. *Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002) 17

Village of Arlington Heights v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) 25, 26

Village of Bensenville v. *FAA*, 457 F.3d 52 (D.C. Cir. 2006) 12, 31

World Wide St. Preachers Fellowship v. *Town of Columbia*, 245 Fed. Appx. 336 (5th Cir. 2007) 21

Constitution:

U.S. Const. amend. I 2

U.S. Const. amend. XIV 26

TABLE OF AUTHORITIES—Continued

Page

Statutes:

28 U.S.C. § 1254(1) 2

775 Ill. Comp. Stat. § 35/15 7

775 Ill Comp. Stat. § 35/30 7

Rules:

S. Ct. R. 10(a) 12

S. Ct. R. 10(c) 23

S. Ct. R. 29.4(c) 2

Other Authorities:

Carol M. Kaplan, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. Rev. 1045 (2000) 5

Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 Cath. Law. 25 (2000) 22, 27, 28

Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155 (2004) 27

Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 Harv. L. Rev. 153 (1997) 27

TABLE OF AUTHORITIES—Continued

Page

The New Shorter Oxford English Dictionary (2005) 28

Laurence H. Tribe, *American Constitutional Law* § 5-16 (3d ed. 2000) 27

5 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 21.6 (3d ed. 1999) 27

Sarah Waszmer, *Taking It Out of Neutral: The Application of* Locke's *Substantial Interest Test to the School Voucher Debate*, 62 Wash. & Lee L. Rev. 1271 (2005) 22

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PETITION FOR A WRIT OF CERTIORARI

St. John's United Church of Christ and two of its members, Helen Runge and Shirley Steele (collectively "St. John's"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Seventh Circuit affirming the District Court's dismissal of petitioners' Free Exercise claim is reported at 502 F.3d 616 and reprinted in the appendix hereto ("App.") at 1a. The opinion of the District Court is reported at 401 F. Supp. 2d 887 and reprinted at App. 64a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 13, 2007. App. 2a. A timely petition for rehearing and rehearing *en banc* was denied on December 4, 2007. App. 105a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).[1]

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

INTRODUCTION

In *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990), and *Church of Lukumi Babalu Aye Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993), this Court held that a law does not offend the Free Exercise Clause so long as it is neutral and generally applicable.

In the 15 years since, the lower courts have divided over a fundamental question: whether a law that singles out religious activity for differential treatment categorically lacks neutrality or general applicability. Four circuits have held that it does. But with the decision below, the Seventh Circuit joins three other circuits that have taken the opposite approach: They have held that a law

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[1] Because their lawsuit challenges the constitutionality of a state statute, petitioners named state officials in their complaint. The State of Illinois, however, moved to dismiss, arguing that Chicago was the proper defendant. The District Court dismissed the State on March 29, 2005. Since then, none of the parties has served the State with any pleadings. Nevertheless, petitioners have served a copy of this Petition on the Attorney General of Illinois. *See* S. Ct. R. 29.4(c).

imposing this sort of differential treatment remains neutral and generally applicable unless the law's object was to target the affected religious activity *because of* its religious nature.

At issue below was the Illinois Religious Freedom Restoration Act ("Illinois RFRA"). As first enacted, the Illinois RFRA provided all religious exercise with across-the-board protection against governmental intrusion. In 2003, however, the legislature amended the Illinois RFRA to withdraw its protections from one religious group: those who worship at religious cemeteries located adjacent to O'Hare International Airport. The legislature stripped RFRA protection from this group because the religious cemeteries supposedly interfered with Chicago's desire to expand O'Hare.

A divided panel of the Seventh Circuit deemed this amendment "neutral," even though it singles out a tiny subset of religious observers, and "generally applicable," even though it leaves the Illinois RFRA's protections applicable to some religious observers but not others. App. 36a. The court so held because it reduced the Free Exercise inquiry to one outcome-determinative question: "whether the object of the [law] was 'to infringe upon or restrict practices because of their religious motivation.'" App. 32a (quoting *Lukumi*, 508 U.S. at 533). Concluding that the legislature was motivated not by religion but by a desire to ease O'Hare's expansion, the court answered in the negative and ended the inquiry.

The panel majority thus embraced a rule that three other circuits—the First, Fifth, and Ninth—have endorsed: Unless the object of a law is to impose special burdens on certain religious groups *because of* religion, strict scrutiny is not triggered. But the

dissenting judge below (Ripple, J.) and four circuits—the Third, Sixth, Tenth, and Eleventh—have taken exactly the opposite approach: They have rejected a motive requirement and held that strict scrutiny applies whenever religious practice is subjected to objectively unequal treatment, even if that unequal treatment "was the means to an entirely secular end." *Shrum* v. *City of Coweta*, 449 F.3d 1132, 1144 (10th Cir. 2006).

This latter approach is the correct reading of *Smith* and *Lukumi*. A statute that objectively treats one religious group differently than all other religious groups categorically lacks neutrality and general applicability and therefore triggers strict scrutiny. To be sure, the *Lukumi* majority suggested that a government motive to burden religion unequally because of its religious nature may be *sufficient* to trigger strict scrutiny, but it did not hold that such a motive inquiry is necessary in cases where religious practice is being subjected to demonstrably unequal treatment. And to clarify matters, Justice Scalia (joined by Justice Thomas) emphasized in *Lukumi* that "[t]he First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted." *Lukumi*, 508 U.S. at 558 (Scalia, J., concurring in part and in the judgment). The rule adopted by the Seventh Circuit rejects that principle. Under the panel majority's approach, the unequal "effects of the laws enacted" will not trigger strict scrutiny unless they are coupled with evidence about the "purposes" animating those laws. *Id.*

The deep division over this issue has not gone unnoticed. Six judges of the Ninth Circuit have recognized "growing confusion among the lower courts" about Free Exercise and predicted that "[i]t is

only a matter of time before the Supreme Court confronts this confusion." *KDM ex rel. WJM* v. *Reedsport School Dist.*, 210 F.3d 1098, 1099 (9th Cir. 2000) (O'Scannlain, J., joined by Kozinski, Nelson, Kleinfeld, Tashima, and Wardlaw, dissenting from denial of rehearing en banc). Scholars likewise have noted that "confusion abounds in the lower courts, which interpret [*Smith* and *Lukumi*] in significantly divergent ways." Carol M. Kaplan, *The Devil Is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. Rev. 1045, 1046 (2000). The Court should grant certiorari to resolve this entrenched conflict and to provide much-needed clarity on this recurring and important question.

STATEMENT OF THE CASE

A. Facts

1. St. John's is a Christian church established in 1849 in Bensenville, Illinois. That same year, St. John's consecrated St. Johannes Cemetery. The remains of about 1,300 people are buried there.

St. John's is part of the United Church of Christ, a Protestant denomination with nearly two million members in the United States. A central belief of the Church is that on the Day of Resurrection, the bodies of Christian believers will be resurrected to live with God. Church members believe that because God ordained St. Johannes as their loved ones' final resting place, the remains should not be disturbed until judgment day. They believe the salvation of deceased members' souls would be impaired if their remains were removed. The District Court and the Seventh Circuit accepted that Chicago's plan to condemn and destroy the cemetery is a "sacrilege to

[St. John's] religious faith"; the sincerity of that belief is not at issue. App. 31a-32a, 81a.

Among the St. John's members who hold these beliefs are petitioners Helen Runge and Shirley Steele. Ms. Runge, now in her 80s, was baptized, married in, and intends to have her funeral at St. John's. About 25 of Ms. Runge's relatives, including her husband and infant son, are buried at St. Johannes. Ms. Runge visits the cemetery to honor those buried there; she also owns a plot next to her husband, where she intends to be buried. She believes disturbing the graves of her husband and son would be a sacrilege. Likewise, Ms. Steele visits the cemetery to care for and exercise her beliefs at the graves of her grandparents and others.

2. In 2001, Chicago announced a massive expansion plan for O'Hare International Airport. App. 5a. As part of this redevelopment, Chicago decided to acquire 433 acres of land in the Villages of Elk Grove and Bensenville, adjacent to O'Hare. *Id.* 6a. The properties scheduled for condemnation included homes, businesses, and two religious cemeteries—St. Johannes and a cemetery owned by the Rest Haven Cemetery Association ("Rest Haven"). *Id.* St. John's and Rest Haven responded by filing separate suits to block the City's acquisition, with St. John's arguing (among other things) that the City could not destroy the cemetery without violating the Illinois RFRA. The Villages of Bensenville and Elk Grove filed a parallel suit; the state court hearing that suit agreed with the localities' claim that the expansion needed a state permit and granted a preliminary injunction. *Id.* 7a.

Faced with this setback, Chicago turned to the Illinois legislature for relief. The legislature

responded by enacting the O'Hare Modernization Act ("OMA"), which re-wrote more than a dozen laws to remove legal obstacles to O'Hare's expansion. Most pertinent here are two provisions: First, the OMA granted Chicago the power to acquire any property needed for the O'Hare project. App. 8a. Second, the OMA amended the Illinois RFRA to eliminate the protections St. John's had previously enjoyed. Before the OMA's amendment, the Illinois RFRA—like its federal namesake—provided that:

> Government may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that [the burden] (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest.

775 Ill. Comp. Stat. § 35/15. But the OMA revoked this across-the-board protection by adding a new Section 30 to the Illinois RFRA: "Nothing in [the Illinois RFRA] limits the authority of the City of Chicago to exercise its powers under the [OMA] for the purpose of relocation of cemeteries or the graves located therein." *Id.* § 35/30. Section 30, in other words, transformed the Illinois RFRA from a statute that provided strict-scrutiny protection to all religious exercise into a statute that provided that protection to *almost* all religious exercise. The one exception: religious exercise involving cemeteries adjacent to O'Hare. Religious adherents in this category are now excluded from the law's benefits.

B. Proceedings Below

1. In light of Section 30, St. John's state-court Illinois RFRA claim was dismissed as moot. St.

John's, Rest Haven, and the localities responded by filing suit in the United States District Court for the Northern District of Illinois. App. 9a. In a proposed second amended complaint, St. John's[2] noted that absent Section 30, Chicago would be required to meet strict scrutiny under the Illinois RFRA before it could destroy or move St. Johannes. The complaint alleged that Section 30 was unconstitutional under the Free Exercise Clause because it stripped from St. John's members a benefit—RFRA protection—available to all other religious activity in the state.

2. The District Court found the Free Exercise claim to be without merit and therefore rejected the second amended complaint as futile, effectively dismissing it. The court correctly noted that this Court has deemed laws that are " 'neutral and of general applicability' " to pass muster under the Free Exercise Clause. App. 83a (quoting *Lukumi*, 508 U.S. at 531). But rather than analyze the neutrality and general-applicability requirements, the court read *Smith* to mean that "strict scrutiny applies only to laws that discriminate against religion." *Id.* 84a. Continuing in this vein, the court asked only whether Section 30 was intended to burden St. John's religious exercise because of religion. The answer, the court found, was no: There was "no indication in the complaint that the object of the law is to infringe upon or restrict practices *because* of their religious motivation" and Section 30 did not "single out St. Johannes or any other cemetery because of its religious affiliation." *Id.* 84a-85a (emphasis in original). The District Court concluded:

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[2] The Rest Haven relocation had by then been deleted from the O'Hare expansion plan.

"Nothing in the complaint supports the proposition that Chicago wants the St. Johannes land for any reason other than * * * the expansion of O'Hare Airport. Because [there] is no indication that § 30 discriminates against religion, this Court applies rational basis review." *Id.* 86a.

3. On appeal, the Seventh Circuit divided two-to-one, with the majority adopting the same approach as the District Court. The majority accepted that the destruction of St. Johannes would be a sacrilege to church members and would impose a burden on their religious exercise. App. 31a-32a. The majority also acknowledged the "obvious point" that St. Johannes is "the only cemetery in the State of Illinois affected by the new § 30." *Id.* 35a-36a. But it concluded that this differential treatment was not sufficient to state a Free Exercise claim. That was so because St. John's had failed to show something more—that "the object of the OMA was 'to infringe upon or restrict practices *because of* their religious motivation.'" *Id.* 32a (quoting *Lukumi*, 508 U.S. at 533) (emphasis added). Having framed the question this way, the majority found it immaterial that St. John's alone was singled out by Section 30. In fact, precisely because St. John's was the only religious group targeted, the majority was all the more convinced "that the legislature had the nondiscriminatory purpose of clearing all land needed for O'Hare's proposed expansion." *Id.* 36a. The majority also found that Section 30 was facially neutral because it did not "'refer[ ] to a religious practice without a secular meaning discernible from the language or context.'" *Id.* 33a (quoting *Lukumi*, 508 U.S. at 533).

The majority, in short, concluded that the government could treat St. John's differently than all

other religious groups in the State, and could thereby impose unique burdens on its members' religious practice, so long as the legislature's underlying motive was unrelated to religion. Because the underlying motive was indeed unrelated to religion, the majority held that "the OMA, including the portion that amends [Illinois RFRA], is a neutral law of general applicability." App. 36a.

This sufficed to dispose of petitioners' claim. The majority nonetheless opined, in dicta, that if strict scrutiny had applied, Section 30 would have satisfied it. Though the task of assessing compelling interest and least-restrictive means is highly fact-bound—and though the case was on appeal from a grant of a motion to dismiss—the majority hypothesized: "Although we think it unnecessary to ask whether the plan passes the strict scrutiny test * * * we add for the sake of completeness that * * * the plan passes muster." App. 36a.

Judge Ripple dissented. He first rejected the majority's conclusion that Section 30 was neutral on its face. Explaining that " '[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from language or context,' " App. 59a (quoting *Lukumi*, 508 U.S. at 533), Judge Ripple concluded that "it is clear that the OMA's amendment to the Illinois RFRA is not facially neutral." *Id.* 59a-60a. He emphasized that the majority's "analysis fails to appreciate that, when read in context," Section 30—an amendment to a law that addressed nothing but religion—had no possible secular referent. *Id.* 60a.

Judge Ripple then turned to the majority's other proposition—that a Free Exercise claim requires not just differential treatment but also a showing that

the government singled out a religious group *because of* religion—and rejected it too. Judge Ripple explained that "[t]he effect of the amendment is to remove from the protections afforded to every other individual's religious observance, those individuals whose religious practices would be substantially burdened by the relocation of cemeteries in connection with the expansion of O'Hare." *Id.* 60a-61a. That unequal treatment was sufficient to trigger strict scrutiny: "The OMA amendment * * * offends the Free Exercise Clause by penalizing those individuals whose religious observance is affected by the expansion project by denying them 'an equal share of the rights, benefits, and privileges enjoyed by other citizens.' * * * [S]trict scrutiny must be applied." *Id.* 61a (quoting *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988)).

Finally, Judge Ripple rebuked the majority for addressing in dicta, and at the motion-to-dismiss stage, how the state's action would have fared under the strict-scrutiny inquiry. He emphasized that the court could not reach the merits of strict scrutiny because "accepting the City's assertions [regarding narrow tailoring] at this stage in the litigation is inconsistent with our obligation * * * to accept all well pleaded facts as true." App. 63a. Since "there has been none of the factual development necessary to determine whether the means chosen by the City are narrowly tailored to meet the compelling interest asserted here," Judge Ripple chided the majority for needlessly speculating that Chicago could satisfy strict scrutiny. *Id.*[3]

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[3] Judge Ripple's conclusion was consistent with that of the only judge to actually review the full panoply of evidence and

REASONS FOR GRANTING THE WRIT

I. THE RULING BELOW EXACERBATES AN EXISTING CIRCUIT SPLIT.

The Seventh Circuit's decision deepens an entrenched circuit split on a question federal courts regularly face: whether selectively imposing burdens on certain religious practices is enough to trigger strict scrutiny under the Free Exercise Clause, or whether plaintiffs must also show that the government specifically burdened their religious practice *because of* its religious nature. The Seventh Circuit held that this extra showing is necessary. That same rule has been embraced by the First, Fifth, and Ninth Circuits. In contrast, at least four other circuits—the Third, Sixth, Tenth, and Eleventh—have held just the opposite. This Court should grant the writ to resolve the four-to-four split. *See* S. Ct. R. 10(a); *Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we

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consider on the merits whether the O'Hare plan could survive strict scrutiny. In *Village of Bensenville* v. *FAA*, 457 F.3d 52 (D.C. Cir. 2006), the D.C. Circuit denied a petition for review brought by, among others, St. John's, which challenged under federal RFRA the decision by the FAA to approve the O'Hare plan. *Id.* at 68. A majority of the D.C. Circuit held, as a threshold matter, that FAA's approval of Chicago's expansion plan was not governed by federal RFRA. Judge Griffith dissented, concluding that federal RFRA did apply. He therefore went on to apply strict scrutiny and found that the FAA had failed to carry its burden under that exacting standard. Petitioners, he explained, had presented alternative designs that would permit O'Hare's expansion while preserving St. Johannes. *Id.* at 77 (Griffith, J., concurring in part and dissenting in part). Indeed, one of these alternatives involves nothing more than "shifting one runway 350 feet" and would "still achieve the FAA's objectives." *Id.*

use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").

A. Four Circuits Hold That Laws Singling Out Religion For Differential Treatment Are Categorically Not Neutral And Generally Applicable.

The decision below squarely conflicts with the decisions of four circuits. These circuits have applied strict scrutiny to laws singling out religious practice for unequal burdens regardless of the government's underlying motivation for imposing those burdens.

The Tenth Circuit. Most recently, the Tenth Circuit so held in *Shrum*, 449 F.3d 1132. *Shrum* concerned a police officer who also worked as a minister. He alleged that the police chief rearranged his work schedule so that it would conflict with his ministerial duties, forcing him to quit his police job. *Id.* at 1134. The allegation was not that the chief had burdened Shrum's religious practice because of its religious nature, but instead that he had done so to achieve an underlying goal unrelated to religion—forcing Shrum to quit the force.

Writing for a unanimous panel, Judge McConnell held that this act triggered strict scrutiny even though the chief's motivation was, at base, secular. "To be sure, Officer Shrum does not allege that Chief Palmer held Officer Shrum's faith against him or acted from religious prejudice," Judge McConnell wrote. "Rather, the claim is that religious discrimination was the means to an entirely secular end: Chief Palmer wanted to force Officer Shrum out, and making him choose between his duties as a police officer and his duties as a minister was the method at hand." *Id.* at 1144. But that fact did not

immunize the chief's action. "[T]he Free Exercise Clause," Judge McConnell wrote,

> is not limited to acts motivated by overt religious hostility or prejudice. As its language suggests, the animating ideal of the constitutional provision is to protect the 'free exercise of religion' from unwarranted governmental inhibition whatever its source. * * * True to this history, the Free Exercise Clause has been applied numerous times when government officials interfered with religious exercise not out of hostility or prejudice, but for secular reasons, such as saving money, promoting education, obtaining jurors, facilitating traffic law enforcement, maintaining morale on the police force, or protecting job opportunities. [*Id.* at 1144-45 (collecting cases) (citations omitted).]

The Tenth Circuit's decision in *Shrum* squarely conflicts with the rule adopted by the Seventh Circuit. In the case below, as in *Shrum*, the government singled out a religious actor for a special burden. The government entities in both cases did so not out of religious hostility, but instead as "the means to an entirely secular end"—airport expansion here and work-force reduction in *Shrum*. The panel below held that because of this "secular reason[ ]," the Illinois law was neutral, generally applicable, and outside the Free Exercise Clause's protection. The case would have come out the other way under the Tenth Circuit's rule.

The majority below denied that its ruling conflicted with *Shrum*. App. 42a. But its attempt to distinguish *Shrum* on its facts misses the point: Unlike the rule the majority adopted, *Shrum* held that laws that treat religious practices differently are

categorically not neutral or generally applicable. Whether the governmental actor was motivated by religious prejudice or animus is simply irrelevant under the Tenth Circuit's decision in *Shrum*. The Tenth Circuit's rule thus squarely conflicts with the decision below, which required plaintiffs to show that the government burdened religious practice *because of* its religious nature.

The Eleventh Circuit. The Eleventh Circuit has adopted the same rule as the Tenth. In *Midrash Sephardi* v. *Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), plaintiffs challenged a zoning ordinance that excluded religious assemblies from a downtown business district but allowed private clubs. *Id.* at 1219. Applying the *Smith-Lukumi* rubric, the court held that the ordinance was non-neutral: It "target[ed]" religious practice in the sense that it "treat[ed] religious assemblies differently than secular assemblies." *Id.* at 1233. According to the court, strict scrutiny was appropriate even though there was no reason to believe that the differential treatment was motivated by a desire to suppress religious exercise: "We reject Surfside's contention that the [business district] is neutral because there is no evidence of selective and discriminatory intent against Orthodox Jews, a pattern of hostility or discriminatory animus toward the synagogues, or evidence that Surfside directly targeted religion." *Id.* at 1234 n.16. As the court explained, "[u]nder *Lukumi*, it is unnecessary to identify an invidious intent in enacting a law—only Justices Kennedy and Stevens attached significance to evidence of the lawmakers' subjective motivation." *Id.* (citing *Lukumi*, 508 U.S. at 540-542; *id.* at 558 (Scalia, J., concurring in part and concurring in judgment)).

The Eleventh Circuit, in short, understood *Lukumi* to condemn not just the imposition of unequal restrictions on a religious practice *because* it is religious, but also the imposition of unequal restrictions for *any* reason at all. Applying that approach here, the decision below would have come out the other way. For although Section 30 was enacted for secular reasons—to make room for a new runway at O'Hare—it nevertheless targeted one type of religious practice for special treatment. Under the Eleventh Circuit's decision in *Midrash*, that alone would have triggered strict scrutiny.

The Third Circuit. The Third Circuit has aligned itself with the Tenth and Eleventh, most notably in decisions authored by now-Justice Alito. *See Blackhawk* v. *Pennsylvania*, 381 F.3d 202 (3d Cir. 2004); *Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359 (3d Cir. 1999).

In *Blackhawk*, the appellant was a Native American who kept bears for religious reasons. State officials demanded that Blackhawk obtain a special permit, and he applied for a waiver, which was denied. *Id.* at 205. Blackhawk sued on Free Exercise grounds, arguing that the waiver process constituted a "system of individualized exemptions" that entitled him to an exemption of his own. *Id.* at 206; *see Smith*, 494 U.S. at 884 ("[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason.").

The Third Circuit, per Judge Alito, agreed that the waiver process at issue created an exemption system sufficient to trigger strict scrutiny. *Id.* at 209. That was so even though there was no evidence that the state had denied Blackhawk's waiver

because of a desire to burden his religious practices. Judge Alito explained why with a quote from his earlier opinion in *Fraternal Order*: "'[T]he * * * exemption raises concern because it indicates that the Department has made a value judgment that secular * * * motivations * * * are important enough to overcome its general interest in uniformity but that religious motivations are not.'" *Id.* at 208 (quoting *Fraternal Order*, 170 F.3d at 366) (alteration in *Blackhawk*). And "'when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.'" *Id.* (quoting *Fraternal Order*, 170 F.3d at 366). *See also Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly*, 309 F.3d 144, 165-168 (3d Cir. 2002).

The Third Circuit's decisions in *Fraternal Order* and *Blackhawk* square with those of the Tenth and Eleventh Circuits. As in *Shrum* and *Midrash*, the Third Circuit found Free Exercise violations based solely on unequal treatment. *Blackhawk*, 381 F.3d at 208. The court never paused to ask *why* government had treated religious practice differently—whether the officials involved had disliked the groups at issue, or conversely whether they had had some wholly benign underlying motive. The mere fact that government had engaged in unequal treatment, which inherently "devalues" religious practice, *Fraternal Order*, 170 F.3d at 366, was sufficient to trigger strict scrutiny.

The Sixth Circuit. In *Kissinger* v. *Board of Trustees*, 5 F.3d 177 (6th Cir. 1993), the Sixth Circuit likewise held that illicit motive is merely a sufficient, not a necessary, condition to trigger strict scrutiny. *Kissinger* involved a student's claim that her college

offended the Free Exercise Clause by requiring her to dissect animals despite her religious beliefs. *Id.* at 178-179. The court applied a disjunctive test drawn from *Smith*. *Id.* at 179. One part focused on the motive inquiry: It asked whether the curriculum was intended to "attack or exclude any individual on the basis of his or her religious beliefs." *Id.* But a separate part of the analysis—a part unconcerned with motive—asked only whether "evidence exist[ed] that any student was allowed to graduate without" participating in the challenged program. *Id.* If the answer had been "yes," the college's curriculum would not have been "generally applicable" and strict scrutiny would have applied. *See id.*

Kissinger squares with *Shrum*, *Midrash*, and *Blackhawk*. Like those cases, it stands for the proposition that laws singling out religious groups are categorically non-neutral or non-generally applicable. These holdings cannot be reconciled with the Seventh Circuit's ruling.

B. Four Circuits Have Adopted A Contrary Rule.

The First, Fifth, and Ninth Circuits have adopted a rule that squarely conflicts with the decisions above. In these circuits—and in the Seventh Circuit now—laws that impose differential treatment on religious groups do not categorically trigger strict scrutiny. Instead, such laws remain neutral and generally applicable unless their object was to target religious activity *because of* its religious nature. Certiorari is warranted to resolve this entrenched split.

The First Circuit. In *Strout* v. *Albanese*, 178 F.3d 57 (1st Cir. 1999), parents challenged a Maine law that allowed the state to fund students' private-

school educations, provided the private schools were "non-sectarian." *Id.* at 59. The court rejected a Free Exercise challenge to this law, concluding that the *Smith-Lukumi* line of cases was "inapposite." *Id.* at 65. This was so because in *Lukumi* "the record showed a substantial animus against [religion] that motivated the law in question. No such showing has been made here." *Id.* The First Circuit, in other words, treated a showing that government singled out religion because of its religious nature as necessary, not merely sufficient, to state a Free Exercise claim, just as the Seventh Circuit did below.

The Ninth Circuit. The Ninth Circuit adopted this same approach in *KDM ex rel. WJM* v. *Reedsport School District*, 196 F.3d 1046 (9th Cir. 1999), *cert. denied*, 531 U.S. 1010 (2000). *KDM* involved an Oregon regulation allowing the provision of state-funded special-education services to private-school students, but only if the services were provided in a "religiously-neutral setting." *Id.* at 1048. When KDM, a disabled child, transferred to a Christian school, the school district no longer allowed a vision specialist to visit him at his schoolhouse. The district instead required KDM—who was blind and suffered from cerebral palsy—to leave the school and travel to a firehouse down the street. *Id.*

KDM argued that the Oregon rule was non-neutral and non-generally applicable because the rule, on its face, treated students at private sectarian schools differently than students at private non-sectarian schools: The latter would not have had to leave their school grounds to receive services. A divided Ninth Circuit panel rejected this challenge. The majority recognized that "the Oregon regulation is not 'neutral.'" *Id.* at 1050. Even so, the majority held

that strict scrutiny was not triggered because "as applied here [the regulation] does not have 'the object or purpose * * * [of] suppression of religion or religious conduct.' " *Id.* (quoting *Lukumi*, 508 U.S. at 533). It concluded: "We agree with the [First Circuit] in *Strout* v. *Albanese*, [which] distinguished *Lukumi* because there was no evidence of 'a substantial animus * * * that motivated the law in question.' " *Id.* (quoting *Strout*, 178 F.3d at 65).

The Ninth Circuit, in short, did just what the Seventh Circuit did below: It conceded that a law singled out religion for unequal treatment but held that that was not enough; the plaintiff also had to show that the law's goal was to burden religious conduct precisely because it was religious conduct.

This holding inspired a pair of impassioned dissents. Judge Kleinfeld, dissenting from the panel decision, explained that "[t]he regulation at issue here is *not* neutral on its face. By requiring a 'religiously-neutral setting,' the government expressly and intentionally discriminates against religious as opposed to secular private schools." *Id.* at 1053 (Kleinfeld, J., dissenting) (emphasis in original). He concluded: "When the government, by a law not neutral on its face, treats people of one or all religions better or worse than others, the constitutional question is traditionally formulated so that the answer has to be 'No!' " *Id.*

KDM's petition for rehearing en banc was denied, but not before six judges heaped criticism on the panel's rule. Judge O'Scannlain, writing on behalf of Judges Kozinski, Nelson, Kleinfeld, Tashima, and Wardlaw, explained that the panel decision suffered from a "fundamental inconsistency with Supreme Court precedent" because under *Lukumi*, "a law that

is *non-neutral on its face*, like the Oregon regulation at issue here, triggers strict * * * scrutiny—even in the absence of extrinsic evidence suggesting that the law was the result of anti-religious bigotry or animus." *KDM ex rel. WJM* v. *Reedsport Sch. Dist.*, 210 F.3d 1098, 1099 (9th Cir. 2000) (O'Scannlain, J., dissenting from denial of rehearing en banc) (emphasis in original). Underscoring the need for this Court to provide clarity and uniformity, Judge O'Scannlain criticized the panel for "contribut[ing] to the growing confusion among the lower courts over the demands of the First Amendment." *Id.*

The Fifth Circuit. Finally, the Fifth Circuit has adopted the approach of the First, Seventh, and Ninth Circuits. In *World Wide Street Preachers Fellowship* v. *Town of Columbia*, 245 Fed. Appx. 336 (5th Cir. 2007), the Fifth Circuit announced in an unpublished opinion that "[t]he constitutional test[ ] for whether governmental action unconstitutionally infringes on the free exercise of religion" is "dependent on whether the restriction was motivated by the nature of the conduct that is restricted." *Id.* at 344. "[A] restriction of religious practices because of their religious nature must survive strict scrutiny. * * * Thus, the motivation for the restriction on the exercise of religion *must be established before the restriction can be legally analyzed.*" *Id.* (emphasis added). This holding is, by its plain terms, irreconcilable with decisions like *Shrum* and *Midrash*. After all, in those cases, the courts recognized that a restriction on religious exercise can—and should—be analyzed by examining nothing more than the restriction's unequal treatment of religion. In contrast, the Fifth Circuit—like the panel majority below—requires courts to divine "the

motivation for the restriction" before reaching any conclusion about its constitutionality.

* * *

The circuits thus divide four-to-four on the question presented by this petition. This persistent division has drawn the attention of not just prominent jurists but also academics. Professor Laycock, a leading religion-law scholar, has noted that "we have the *Smith/Lukumi* test, but we have considerable disagreement over what exactly that test means." Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 Cath. Law 25, 26 (2000). Other commentators likewise have noted that "[t]he federal circuits have split on whether *Lukumi* requires an object to infringe upon religious practice before a law must be supported by a compelling government interest" and that "the Supreme Court has not addressed this split." Sarah Waszmer, *Taking It out of Neutral: The Application of* Locke*'s Substantial Interest Test to the School Voucher Debate*, 62 Wash. & Lee L. Rev. 1271, 1285 (2005).

On a broader level, the legal academy has long documented the lower courts' confusion about what it means to say government must be "neutral" toward religion. *See, e.g.*, Laycock, *supra*. That confusion has not escaped the attention of the Justices of this Court. In 1999, Justice Thomas noted that the "lower courts * * * are struggling to reconcile our conflicting First Amendment pronouncements," and suggested that the Court provide "much needed guidance." *Columbia Union College* v. *Clark*, 527 U.S. 1013 (1999) (Thomas, J., dissenting from denial of certiorari). That guidance is needed more urgently today than it was then. This Court should exercise

its certiorari jurisdiction to resolve the deep divisions within the country.

II. THE RULING BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS.

The rule adopted below also conflicts with this Court's Free Exercise jurisprudence. This Court's cases establish that an underlying motive to burden religion may be a *sufficient*, but is not a *necessary*, condition to trigger strict scrutiny: Where unequal treatment exists, that is enough to render the governmental action non-neutral and non-generally applicable.[4] The Seventh Circuit's contrary holding leads to absurd results in practice, immunizing religion-targeting laws simply because they were adopted in good faith and for secular reasons. The Court should grant the writ and clarify that "neutrality" and "general applicability" do not turn on any showing of religious hostility. *See* S. Ct. R. 10(c) (certiorari is warranted when "a United States court of appeals * * * has decided an important federal question in a way that conflicts with relevant decisions of this Court").

1. The Free Exercise Clause's modern history begins with *Smith*. *Smith* involved two men who were denied unemployment benefits after being fired for using peyote. 494 U.S. at 874. They challenged the denial, arguing that they were entitled to a religious exemption for their peyote use. The Court declined to apply strict scrutiny. It concluded that "the right of free exercise does not relieve an

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[4] It does not matter whether the treatment is unequal *vis a vis* another religious group or *vis a vis* a secular group. Either type of singling-out runs afoul of the First Amendment. *See Larson* v. *Valente*, 456 U.S. 228, 245-246 (1982).

individual of the obligation to comply with a valid and neutral law of general applicability." *Id.* at 879 (quotation omitted). The Court explained that "if prohibiting the exercise of religion" is "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.* at 878.

The Court subsequently considered in *Lukumi* several municipal ordinances that were designed to prohibit Santeria animal sacrifice, while leaving activities such as fishing untouched. *Lukumi*, 508 U.S. at 543. The Court, per Justice Kennedy, held that the ordinances triggered strict scrutiny.

Justice Kennedy analyzed separately the "neutrality" and "general applicability" inquiries. As to the first, he noted that "*[a]t a minimum*, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 531 (emphasis added). He explained that "the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* at 533. That "minimum requirement" is violated if the law "refers to a religious practice without a secular meaning discernible from the language or context." *Id.*

In a separate section of his neutrality analysis—a section joined only by Justice Stevens—Justice Kennedy wrote that "[i]n determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases." *Id.* at 540. He suggested that "[h]ere, as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence," including legislative

history. *Id.* (citing *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267-268 (1977)). Having examined this evidence, Justice Kennedy concluded that the ordinances "were enacted 'because of,' not merely 'in spite of,' their suppression of Santeria religious practice." *Id.* (quoting *Arlington Heights*, 429 U.S. at 279).

Writing for a majority again, Justice Kennedy "turn[ed] next to a second requirement of the Free Exercise Clause, the rule that laws burdening religious practice must be of general applicability." *Id.* at 542. Here he abandoned his concerns for "legislative object" and focused on the differential treatment of similarly situated actors: "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id.* at 542-543. He concluded that the ordinances were non-generally applicable because they burdened Santeria animal sacrifice while not burdening other practices—fishing, for example—that also undermined the ordinances' ostensible goals. *Id.* at 544-545.

Justice Scalia, joined by Chief Justice Rehnquist, concurred in part but rejected Justice Kennedy's analogy to the Equal Protection Clause. He explained that First Amendment analysis does not require "determination of legislative motive." *Id.* at 558 (Scalia, J., concurring in part and concurring in the judgment). He explained that "[t]he First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted." *Id.* at 559. For that reason, it would not matter "that a legislature consists entirely of the

pure-hearted, if the law it enacts in fact singles out a religious practice for special burdens." *Id.*

2. The panel majority below viewed *Smith* and *Lukumi* as cases about motive. According to the panel, *Smith* and *Lukumi* require not just that religious activity be singled out but also that the singling-out be motivated by the activity's religious aspects. That rule, however, conflicts with *Smith* and *Lukumi* in at least three ways.

a. *First*, a motive requirement cannot be extracted from *Lukumi*. The Court focused on legislative "object" only when analyzing one of the two Free Exercise inquiries—neutrality—and not the other—general applicability. The general-applicability inquiry was instead concerned with differential treatment of similarly situated entities. *See Lukumi*, 508 U.S. at 542-544. Indeed, the majority's explanation of "general applicability" used language that cannot be reconciled with a motive requirement: It wrote that government, even "*in pursuit of legitimate interests*, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 542-543 (emphasis added). Further, even the neutrality discussion was not so limited. *Lukumi* did not announce that an intent to suppress religion was *required* to deem a law non-neutral, but only that it was sufficient. *See id.* at 532 ("*At a minimum*," the Clause pertains to a law that "regulates or prohibits conduct because it is undertaken for religious reasons.") (emphasis added). And importantly, the portion of *Lukumi* tying the Free Exercise Clause to *Arlington Heights*-style "because of, not in spite of" equal-protection analysis garnered only two votes.

These points have led four circuits to conclude that the *Smith-Lukumi* line does not announce a motive requirement—a conclusion with which the legal academy agrees. "Whatever else it may be, *Lukumi* is not a motive case. * * * Seven Justices failed to find bad motive, but nine voted to strike down the ordinances." Laycock, 40 Cath. Law at 28. Then-Professor (now Judge) McConnell reached the same conclusion: "*Smith* did not limit free exercise protection to laws motivated by 'religious bigotry,' 'persecution,' or even 'animus or hostility to the burdened religious practices' * * *. Rather, *Smith* held that the Free Exercise Clause applies to laws that are not neutral or generally applicable (regardless of their motivation)." Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 Harv. L. Rev. 153, 167 (1997); *see also* Laurence H. Tribe, *American Constitutional Law* § 5-16, at 956 (3d ed. 2000) (same); 5 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 21.6, at 106 (3d ed. 1999) (same).[5]

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[5] This Court has decided one Free Exercise case since *Lukumi*, but it is not to the contrary. In *Locke* v. *Davey*, 540 U.S. 712 (2004), the Court held that a government's decision not to fund certain religious instruction is permissible unless it (1) burdens religious practice *or* (2) is the product of bad motive. *See Locke*, 540 U.S. at 720; *see also* Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 216 (2004). Here, Section 30 concededly imposes a substantial burden on religious practice. *Locke*'s "motive" discussion therefore is irrelevant. In any event, *Shrum*, *Midrash* and *Blackhawk*—all of which rejected a motive requirement—were decided after *Locke* was handed down. *Locke* therefore has not ameliorated the circuit split.

The Seventh Circuit ignored this guidance—and the holdings of four sister circuits—when it announced its contrary rule. In so doing it saw fit to rely explicitly on the equal-protection portion of *Lukumi*, even though that portion attracted just two votes. App. 34a. Its motive requirement, in short, relies on portions of *Lukumi* that were rejected by most of the Court and cannot in any event be squared with the rest of *Lukumi*'s text.

b. *Second*, the inclusion of a motive requirement, even in cases where unequal treatment and burden have been shown, is unfaithful to the plain language of both the Free Exercise Clause and the Court's test. As to the former, the Court was careful to note in *Smith* that the rule adopted there was a "permissible reading of the [constitutional] text." 494 U.S. at 878. Not so with the Seventh Circuit's approach: It looks only to "the purposes for which legislators enact laws," and not, like the Clause itself, "to the effects of the laws enacted." *Lukumi*, 508 U.S. at 558 (Scalia, J., concurring in part and concurring in the judgment). And as to the latter, the Seventh Circuit's approach hews to the plain meaning of neither the word "neutral" nor the phrase "generally applicable." "Neutral" means "taking neither side," *The New Shorter Oxford English Dictionary* (2005); it can hardly be said that a law extending benefits to all religious adherents and then withdrawing them from a small group is neutral. It is still more difficult to claim such a law is generally applicable. "Taking 'generally applicable' at its literal English meaning, the law has to apply to everyone, or nearly everyone." Laycock, 40 Cath. Law at 26-27. Not so with Illinois RFRA after the addition of Section 30.

Because the Seventh Circuit's approach strays from the plain meaning of "neutral" and "generally applicable" it creates the potential for absurd results. Say, for example, that a Virginia law provided: "All religious adherents shall be entitled to strict-scrutiny protection for their religious exercise, except those who belong to churches or synagogues in downtown Richmond." It is difficult to imagine how such a law could be considered "neutral" or "generally applicable," regardless of the legislature's motivation in enacting it. And yet this hypothetical law is identical in every relevant respect to the law deemed neutral and generally applicable by the court below.[6]

c. *Third*, and finally, the approach adopted by the Seventh Circuit conflicts with this Court's cases because it effectively collapses the Free Exercise inquiry announced in *Smith* and *Lukumi* from two stages into one. Under *Smith* and *Lukumi*, a court must first determine whether a law is neutral and generally applicable; if it is not, strict scrutiny applies and the court *then* considers the government's interest, determining whether it is "compelling." Under the Seventh Circuit's approach, by contrast, consideration of the government's interest is imported into stage one of the analysis and permitted to distort the neutrality and general-applicability inquiries. Under the Seventh Circuit's

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[6] That the hypothetical law mentions "church" and "synagogue," while Section 30 avoids words that connote religion, is not a relevant difference. After all, "a law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language *or context*." *Lukumi*, 508 U.S. at 533 (emphasis added). Section 30 lacks a discernible secular meaning when read in context, for it amends a law—the Illinois RFRA—that has religion as its only subject.

approach, so long as the government can identify some legitimate, secular reason for its differential treatment, that is the end of the inquiry. This rule radically restricts the Free Exercise Clause protection that *Smith-Lukumi* carefully preserved.

III. THE CASE PRESENTS AN IDEAL VEHICLE TO ADDRESS AN IMPORTANT AND RECURRING QUESTION.

1. Free-exercise cases are far from rare—several hundred have been decided just in the federal appellate courts in the past decade—and this case presents an ideal vehicle to address a question about free-exercise doctrine that has vexed the lower courts since *Smith* and *Lukumi* were handed down. The question presented was squarely raised and addressed below. App. 31a-36a. Other circuits have weighed in with analyses so clearly incompatible as to be outcome-determinative. *Supra* at 13-19. And there are no procedural complications that would prevent the Court from reaching the merits.

The fact that the panel majority speculated in dicta that Chicago could satisfy strict scrutiny creates no barrier to this Court's review. Indeed, even respondents have admitted that this portion of the majority's opinion was "wholly unnecessary to the decision." Answer of Defendants-Appellees to Petition for Panel Rehearing or, in the Alternative, Rehearing En Banc 13 (filed Nov. 16, 2007). It was also inappropriate because the strict-scrutiny test is a heavily fact-bound inquiry—one which an appellate court is ill-suited to resolve in the first instance on an appeal arising from a motion to dismiss. *See* App. 63a (Ripple, J., dissenting). Moreover, the only federal judge ever to apply strict scrutiny to the O'Hare plan on a fully developed factual record

concluded that the government had failed to carry its burden of demonstrating the existence of "least restrictive means." *Village of Bensenville*, 457 F.3d at 77 (D.C. Cir. 2006) (Griffith, J., concurring in part and dissenting in part). Judge Ripple was therefore exactly right to criticize the majority for ruminating in dicta on the strict-scrutiny test when "there has been none of the factual development necessary to determine whether the means chosen by the City are narrowly tailored to meet the compelling interest asserted here." App. 63a. Because this Court is not bound even by its own dicta, *see Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006), it need not be detained by that of the panel majority below.

Nor should this Court be deterred by any fear that, as a practical matter, petitioners' victory on the merits would block an expansion of O'Hare. Petitioners are not Luddites seeking to block modern improvement to O'Hare. They instead simply want to ensure that their religious cemetery is not destroyed if there are in fact less destructive alternatives—the very purpose of the strict-scrutiny analysis. To that end, petitioners themselves have identified alternative designs that would save St. Johannes while allowing the O'Hare expansion to proceed *almost exactly* as Chicago has envisioned it. *See supra* at 12; *Village of Bensenville*, 457 F.3d at 77 (Griffith, J., concurring in part and dissenting in part) (noting petitioners' alternative designs and finding that the FAA offered only "conclusory responses" that did not allow the court to "determine if any of these alternatives are a less restrictive means"). The Court therefore may take this opportunity to clarify the Free Exercise Clause's meaning without fear that "strict mechanical

adherence" to the resulting doctrine would "produce[ ] absurd results." *Maislin Indus. U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 151 (1990) (Stevens, J., dissenting).

2. It has been 15 years since the Court squarely addressed the issues presented by this case. In that time, an impressive list of legal lights—judges, scholars, even a Justice of this Court—have recognized that the lower courts' Free Exercise jurisprudence is hopelessly divided. Because the question whether governmental conduct violates the Constitution should not turn on accidents of geography, this Court should grant the writ.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RONALD D. ROTUNDA
GEORGE MASON UNIVERSITY
SCHOOL OF LAW
3301 Fairfax Drive
Arlington, VA 22201
(703) 993-8041

JOSEPH V. KARAGANIS
A. BRUCE WHITE
JOHN W. KALICH
KARAGANIS, WHITE &
MAGEL LTD.
414 North Orleans Street
Suite 810
Chicago, Illinois 60610
(312) 836-1177

CHRISTOPHER T. HANDMAN*
ROBERT E. COHN
DOMINIC F. PERELLA
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5719

*Counsel of Record

Counsel for Petitioners

APPENDICES

APPENDIX A

In the

UNITED STATES COURT OF APPEALS
for the SEVENTH CIRCUIT

No. 05-4418

ST. JOHN'S UNITED CHURCH OF CHRIST, HELEN RUNGE, and SHIRLEY STEELE,

Plaintiffs-Appellants,

v.

THE CITY OF CHICAGO, the FEDERAL AVIATION ADMINISTRATION, and MARION C. BLAKELY, Administrator of the Federal Aviation Administration,

Defendants-Appellees.

Nos. 05-4450 & 05-4451

VILLAGE OF BENSENVILLE, VILLAGE OF ELK GROVE, ROXANNE MITCHELL, REST HAVEN CEMETERY ASSOCIATION, ROBERT PLACEK, and LEROY H. HEINRICH,

Plaintiffs-Appellants,

v.

THE CITY OF CHICAGO, the FEDERAL AVIATION ADMINISTRATION, and MARION C. BLAKELY, Administrator of the Federal Aviation Administration,

Defendants-Appellees.

Nos. 05-4418, 05-4450 & 05-4451

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 03 C 3726—**David H. Coar**, *Judge.*

ARGUED JAN. 10, 2006; JUNE 7, 2006—

DECIDED SEPT. 13, 2007

Before: BAUER, RIPPLE, and WOOD, Circuit Judges.

WOOD, *Circuit Judge.* Mention Chicago to almost any person who has been on an airplane, and that person will immediately think of Chicago's O'Hare International Airport. It is one of the busiest airports in the world: in 2005, more than 76.5 million passengers passed through its facilities, along with 1.7 million tons of freight. See http://www.flychicago.com/events/KidsPage2006/OHareHistory.shtm (last visited August 27, 2007). It is also of central importance to the economy of Chicago and

Northern Illinois, generating approximately 514,000 jobs for the region and nearly $37 billion a year in economic development. *Id.* Responding to growth in demand for O'Hare's services, the Illinois General Assembly passed the O'Hare Modernization Act (OMA), 620 ILCS 65/5, in 2003, in order to improve and expand the airport. This case deals with certain land acquisitions contemplated by that legislation.

We consolidated these appeals for decision because each raises challenges to the same district court order in lawsuits filed by objectors to the modernization project. In that order, the court denied a motion for leave to file a second amended complaint (for all but one count) and refused to enjoin the City of Chicago's plan to acquire each plaintiff's property in order to build additional runways at O'Hare. In appeal number 05-4418, the St. John's United Church of Christ and two of its parishioners (collectively, St. John's) challenge the district court's denial of their motions for leave to file a second amended complaint and for a preliminary injunction. St. John's claims that the City's attempt to condemn a cemetery located on church property violates the First Amendment's Free Exercise Clause, the Fourteenth Amendment's Equal Protection Clause, and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.* We consider only the claims St. John's has asserted against the City; its claims against the Federal Aviation Administration (FAA) were resolved in the FAA's favor by the court of appeals for the

District of Columbia Circuit in *Village of Bensenville v. FAA*, 457 F.3d 52 (D.C. Cir. 2006).[1]

In appeal number 05-4450, the Villages of Bensenville and Elk Grove (Municipal Plaintiffs) contend that the district court erred in concluding that it lacked jurisdiction to review their claims against the FAA. Lastly, in appeal number 05-4451, we consider the challenge of the Rest Haven Cemetery Association and two members of its board of directors (collectively, Rest Haven) to the district court's dismissal of the first amended complaint. Rest Haven was not named in the proposed second amended complaint because the City no longer plans to acquire its cemetery. The district court concluded, for that reason, that its claim was

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[1] The main issue before the D.C. Circuit concerned whether the FAA had violated the federal Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*, by approving the City's plan and determining that the plan was eligible for federal funding. As an "agency . . . of the United States," § 2000bb-2(1), the FAA, unlike the City, falls within the scope of RFRA and thus must meet the requirements of strict scrutiny when its actions substantially burden exercise of someone's religion. The D.C. Circuit considered whether any potential burden on the exercise of religion in this case could be fairly attributable to the FAA by virtue of its having approved the City's plan. Because "[t]he expansion plan for the airport, which is owned by the City, was prepared and will be implemented by the City, which is prepared to proceed without federal funds if necessary," the court found that it was the City, not the FAA, that was responsible for any potential burden on religion that resulted from the plan. *Bensenville*, 457 F.3d at 57. It thus rejected the RFRA claims against the FAA without reaching the question whether the FAA had shown a compelling governmental interest supporting its decision.

moot; Rest Haven disagrees with that assessment. In Rest Haven's appeal, we also consider the same question raised by the Municipal Plaintiffs, namely, whether the district court had jurisdiction to consider Rest Haven's claims against the FAA. We conclude that the district court navigated its way through these complex issues successfully, and we thus affirm its judgment in all respects.

I

In the summer of 2001, the U.S. Senate Commerce, Energy, and Transportation Committee held hearings in Chicago to discuss the ways in which delays at O'Hare contribute to excessive aviation delays throughout the United States. During the course of these hearings, the Committee strongly hinted that if the City of Chicago and the State of Illinois did not reach a decision on airport expansion before September 1, 2001, Congress would likely intervene.

On June 29, 2001, the City announced its plan to increase O'Hare's capacity; this plan later developed into the O'Hare Modernization Program (OMP). The OMP proposed to correct some of the inefficiencies created by the airfield's outdated configuration of seven intersecting runways (which include a "runway triangle" created by the three original intersecting runways that lie north of the present terminals) by creating six parallel and two crosswind runways. The proposed design resembles the more effective runway architecture that has been employed at Hartsfield-Jackson Atlanta International Airport and the Dallas/Fort Worth International Airport. In contrast to

the current layout of intersecting runways, in which the ability to use one runway is limited by whether an aircraft is using any of the others, the proposed configuration would permit a constant stream of take-offs and landings on each parallel runway, regardless of the activity that may simultaneously be occurring on adjacent runways.

On December 5, 2001, the Mayor of Chicago and the Governor of Illinois announced that they had reached an agreement on the central components of the proposed OMP. Shortly thereafter, the FAA submitted its Notice of Intent to Prepare an Environmental Impact Statement (EIS), which is a "detailed analysis . . . conducted to determine if, or the extent to which, a particular agency action will impact the environment." *Heartwood, Inc. v. United States Forest Serv.*, 230 F.3d 947, 949 (7th Cir. 2000). All federal agencies are required to prepare an EIS for any "major Federal actions significantly affecting the quality of the human environment." See the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C).

In June of 2002, the City announced its plan to acquire 433 acres of land located in the Villages of Elk Grove and Bensenville, two municipalities adjacent to O'Hare, in anticipation of the airport's expansion. A wide variety of properties were scheduled for condemnation, including a number of homes and businesses, a police and fire station, an elementary school, several parklands, and the two cemeteries at issue here—St. Johannes and Rest Haven, owned by the St. John's United Church of Christ and the Rest Haven Cemetery Association, respectively. The

Municipal Plaintiffs responded by filing suit in state court seeking both a declaration that any effort to acquire the desired property without first obtaining a "certificate of approval" from the Illinois Department of Transportation was beyond the City's authority under the Illinois Aeronautics Act, see 620 ILCS 5/47, and a preliminary injunction preventing the City from proceeding with its land acquisition plan. On July 9, 2002, the Circuit Court of DuPage County granted the municipalities' requested relief; the Illinois Appellate Court affirmed its decision. See *Philip v. Daley*, 790 N.E.2d 961 (Ill. App. Ct. 2003).

Faced with this setback, the City turned to Springfield and the Illinois General Assembly for help. It was successful in persuading the legislature to enact the OMA in May of 2003. See 620 ILCS 65/5. The Act's statement of findings and purposes notes the importance of O'Hare to both the state and national air transportation system and affirms the necessity of acquiring adjacent properties as part of the modernization program. See OMA § 5(a)(1), (2), (5). In addition, the Act proclaims that "[i]t is the intent of the General Assembly that all agencies of this State and its subdivisions shall facilitate the efficient and expeditious completion of the O'Hare Modernization Program to the extent not specifically prohibited by law, and that legal impediments to the completion of the project be eliminated." OMA § 5(b).

The Act specifically addresses the issue of acquisition of property in several places. It does so generally in section 15, which grants to the City "[i]n addition to any other powers the City may have, and

notwithstanding any other law to the contrary," the power to

> acquire by gift, grant, lease, purchase, condemnation . . . or otherwise any right, title, or interest in any private property, property held in the name of or belonging to any public body or unit of government, or any property devoted to a public use, or any other rights or easements, including any property, rights, or easements owned by the State, units of local government, or school districts, including forest preserve districts, for purposes related to the O'Hare Modernization Program.

OMA § 15. Lest there be any doubt on the particular topic of cemeteries, the Act continues: "The powers given to the City under this Section include the power to acquire, by condemnation or otherwise, any property used for cemetery purposes within or outside of the City, and to require that the cemetery be removed to a different location." See also *id.* § 92 (amending the Illinois Municipal Code, 65 ILCS 5/11-51-1, to make it clear that the City of Chicago need not obtain the consent of a cemetery's owner in order to exercise its powers under § 15 of the OMA, even though such consent is normally required).

The OMA amends many statutes—indeed, as counsel for the City argued, it seems to have amended every statute that someone thought might stand in the way of the OMP. Thus, for example, it amends the Downstate Forest Preserve District Act, 70 ILCS 805/5e, OMA § 93; the Vital Records Act, 410 ILCS

535/21, OMA § 93.5; the Illinois Aeronautics Act, 620 ILCS 5/38.01, OMA § 94; and the Code of Civil Procedure, 735 ILCS 5/2-103, OMA § 95. Among these many modifications is the one that is central to this litigation: the addition of a new section 30 to the Illinois Religious Freedom Restoration Act (IRFRA), 775 ILCS 35/1 *et seq.* OMA § 96. The IRFRA provides generally that the "[g]overnment may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the b rden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest." 775 ILCS 35/15. That broad language was qualified by the new section 30, which states: "Nothing in this Act [*i.e.* IRFRA] limits the authority of the City of Chicago to exercise its powers under the [OMA] for the purpose of relocation of cemeteries or the graves located therein." 775 ILCS 35/30.

On May 30, 2003, shortly after the legislature enacted the OMA, the Municipal Plaintiffs, St. John's, and Rest Haven filed suit in the United States District Court for the Northern District of Illinois against the City of Chicago, Mayor Richard M. Daley, the State of Illinois, Governor Rod Blagojevich, and both the FAA and its administrator alleging a number of violations of federal law. On June 19, 2003, Plaintiffs filed an amended complaint. Most of the counts of the amended complaint challenged the City's plan to acquire land before the FAA issued its EIS or Record of Decision (ROD). Additionally, all of the Plaintiffs

alleged that the City, along with the Mayor, violated NEPA and its implementing regulations, the National Historic Preservation Act (NHPA), 16 U.S.C. § 470, *et seq.*, § 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c), as well as provisions of the Administrative Procedures Act, 5 U.S.C. § 706.

In the amended complaint, St. John's and Rest Haven also asserted a number of claims based on religion against the City. They alleged that the City, in proposing to condemn their cemeteries without demonstrating a compelling governmental interest and use of the least restrictive mechanism, as IRFRA ordinarily requires, violated their constitutional rights under the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. These plaintiffs charged that the City is "targeting" their religious activities and posing a substantial burden on their ability to practice their religion. Plaintiffs also alleged that the City's plan to condemn their cemeteries violated the federal Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.* Additionally, they asserted violations of the Fifth Amendment's Takings Clause and the Fourteenth Amendment's Due Process clause. Finally, these Plaintiffs raised similar religion-based claims against the State of Illinois and Governor Blagojevich, and against the FAA and its administrator, including an allegation that the FAA violated the federal RFRA. On March 29, 2005, the district court dismissed the State of Illinois and Governor Blagojevich from the case on Eleventh Amendment immunity grounds.

As this suit was pending before the district court, the parties entered into a court-approved order under which the City agreed that it would not acquire property in Bensenville and Elk Grove, including the St. John's and Rest Haven Cemeteries, until the FAA issued an EIS or a ROD. At the end of 2003, the City began to move forward with other components of its plan to expand O'Hare, seeking FAA approval for over $1.3 billion in federal funds for "Phase One" of the OMP. Specifically, the City requested about $300 million in airport improvement program discretionary funds, $63 million in entitlement funds, and over $1 billion in Passenger Facility Charge (PFC) funds. Phase One of the project was to include the demolition of the cemeteries, as well as other property in the villages. In late July of 2005, the FAA issued its final EIS, which compared the environmental impact of the City's proposal with other alternatives and concluded that the City's airport plan, with some minor revisions, was the preferred course. The EIS also reviewed the legal issues raised by St. John's and Rest Haven, ultimately concluding that if the City's plan was approved in the ROD, the St. Johannes Cemetery would be relocated, while the Rest Haven Cemetery would not.

On September 30, 2005, the FAA issued its ROD granting the City's request for approval of its airport layout plan. The ROD considered St. John's RFRA claims and concluded that although the acquisition and relocation of the St. Johannes cemetery was likely to burden the exercise of the parishioners' religion substantially, the City had a compelling interest in

relocating the cemetery in order to make O'Hare more efficient. The same day that the FAA issued its ROD, the Municipal Plaintiffs and St. John's filed a petition for review of the EIS and ROD in the D.C. Circuit. Their petition alleged, among other things, that the FAA's approval of the airport layout plan violated a number of provisions of federal law, including the First and Fifth Amendments and RFRA. Along with their petition for review, the Plaintiffs filed an emergency motion for a stay pending appeal and a motion for an administrative stay, which the D.C. Circuit granted. Rest Haven was not a party to this litigation.

In light of the FAA's approval of the airport layout plan and the claims pending before the D.C. Circuit, the district court issued an order to show cause why certain parties and claims should not be dismissed. Given that the Rest Haven Cemetery had by then been excluded from the OMP and that the City was not challenging this step, the district court suggested that Rest Haven should voluntarily dismiss itself from the suit. The district court also ordered the Plaintiffs to show cause why Mayor Daley should not be dismissed from the suit, because suing him in his official capacity and suing the City of Chicago amounted to the same thing. The district court also questioned its jurisdiction to review claims asserted against the FAA involving the ROD.

Before the district court issued its show cause order, however, the FAA informed the D.C. Circuit that it planned to award the City the $363 million in discretionary funds it had requested to begin the implementation of the first phase of the OMP. It made

this announcement despite the fact that it had not yet formally rendered a decision granting the City's request. The City argued that in the absence of the FAA's final order rendering a decision on funding, the court was without jurisdiction to consider Plaintiffs' NEPA and RFRA claims. On October 25, 2005, the D.C. Circuit denied St. John's and the Municipal Plaintiffs' emergency motion for a stay pending appeal, determining that they had not demonstrated either the irreparable injury or the likelihood of success on the merits required for the issuance of a stay pending review. At that point, the court did not address the jurisdictional question.

On October 26, 2005, St. John's and the Municipal Plaintiffs returned to the district court and filed a motion for leave to file a second amended complaint. Rest Haven was not listed as a party to the motion for leave to file the second amended complaint. The proposed second amended complaint included a claim that the FAA had violated the Freedom of Information Act (FOIA), 5 U.S.C. § 552, *et seq.*, when it allegedly ignored the Plaintiffs' requests for documents relating to O'Hare's expansion. On October 31, 2005, St. John's filed a motion for a temporary restraining order and a motion for a preliminary injunction, seeking to halt all action on the City's part while all these challenges were pending. The district court entered a temporary restraining order as it reviewed these motions.

After filing these motions in district court, the Plaintiffs then filed a docketing statement of issues in the D.C. Circuit. In addition to the claims they raised against the FAA before the district court, Plaintiffs

asked the D.C. Circuit to decide whether it was improper for the FAA to fail to rule on Chicago's funding applications, whether the FAA had issued an unlawful ROD, and whether their First Amendment and RFRA claims were entitled to *de novo* review of disputed factual questions in an Article III court.

At that juncture, the district court dismissed Rest Haven from the litigation. Because the City no longer planned to acquire the Rest Haven Cemetery, and because Rest Haven did not present any argument explaining why or how it might be affected by either the City's or the FAA's actions in their response to the order to show cause, the district court held that its claims were moot. The court also dismissed Mayor Daley from the litigation, concluding that the Plaintiffs had not responded to the issue it raised in the order to show cause (whether it was redundant to sue both the City and the Mayor in his official capacity). The Plaintiffs do not challenge the dismissal of Mayor Daley from this suit on appeal.

With respect to St. John's religious claims against the City, the district court concluded that the Plaintiffs failed to state a claim upon which relief could be granted under the Free Exercise Clause or the Equal Protection Clause. It found that the OMA was constitutional on its face and that there was no indication that any of the City's proposed actions were motivated by St. John's religious affiliation. The district court also denied St. John's motion for leave to file a second amended complaint with respect to these claims, finding them to be similarly lacking. Additionally, the district court dismissed all counts of

the complaint that pertained to RLUIPA, concluding that the City's plan to condemn the St. Johannes Cemetery was not a "land use" regulation as contemplated by that statute.

The district court also dismissed the bulk of St. John's and the Municipal Plaintiffs' claims against the FAA and its administrator. It concluded that it lacked jurisdiction to review challenges to the FAA's actions concerning the ROD because under 49 U.S.C. § 46110, those claims fell within the exclusive jurisdiction of the court of appeals. Indeed, as the court recognized, the D.C. Circuit was already considering these claims. After dismissing these claims, all that remained was St. John's and the Municipal Plaintiffs' FOIA claim, for which the district court granted the motion for leave to file a second amended complaint. Given the dismissal of virtually all of the Plaintiffs' claims against the City and the FAA, the district court vacated the temporary restraining order and denied the motion for a preliminary injunction as moot. Plaintiffs have appealed from that decision. See 28 U.S.C. § 1292(a)(1).

II

We review *de novo* the district court's grant of a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, accepting as true "all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (quoting *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007)). We

may affirm the dismissal only if the complaint fails to set forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic*, 127 S. Ct. at 1974. As we held in *Airborne Beepers & Video, Inc. v. AT&T Mobility LLC*, 2007 WL 2406859 (7th Cir. Aug. 24, 2007), a district court should dismiss a complaint if "the factual detail . . . [is] so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8." *Id.* at *5. A district court's decision whether to allow a party to file a second amended complaint, however, is reviewed for abuse of discretion. See *Doherty v. Davy Songer, Inc.*, 195 F.3d 919, 927 (7th Cir. 1999).

With respect to the district court's decision that St. John's motion for a preliminary injunction is moot, we review the court's "findings of fact for clear error, its balancing of the factors for a preliminary injunction under the abuse of discretion standard, and its legal conclusions *de novo*." *Linnemeir v. Bd. of Trs. of Purdue Univ.*, 260 F.3d 757, 761 (7th Cir. 2001). In assessing whether a preliminary injunction is warranted, we must consider whether the party seeking the injunction has demonstrated that "1) it has a reasonable likelihood of success on the merits; 2) no adequate remedy at law exists; 3) it will suffer irreparable harm if it is denied; 4) the irreparable harm the party will suffer without injunctive relief is greater than the harm the opposing party will suffer if the preliminary injunction is granted; and 5) the preliminary injunction will not harm the public interest." *Id.*

III

Before turning to the merits, we must address two jurisdictional issues that the Municipal Plaintiffs and Rest Haven have raised. The first is whether the district court erred in dismissing with prejudice all claims brought by Rest Haven as moot, because the City no longer plans to acquire that cemetery. Second is the question whether the district court correctly dismissed the Municipal Plaintiffs' claims against the FAA for lack of jurisdiction based upon 49 U.S.C. § 46110. We review *de novo* the district court's grant of a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), which includes a dismissal on mootness grounds. See, *e.g., Franzoni v. Hartmarx Corp.*, 300 F.3d 767, 771 (7th Cir. 2002). "When reviewing a dismissal for lack of subject matter jurisdiction, we note that a district court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff." *Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 554 (7th Cir. 1999). In considering such a motion, "[t]he district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Id.*

A. Rest Haven

At the beginning of the EIS process, the City submitted to the FAA a proposed revision to its airport layout plan that included the construction of a runway in an area that would require the relocation of existing

air cargo facilities. In that proposed plan, the City indicated that it wanted to move these facilities to the site that is currently the Rest Haven Cemetery. The FAA concluded in its final EIS, however, that it would be possible to relocate the air cargo facilities without disturbing Rest Haven. Ultimately, on September 29, 2005, the FAA issued its ROD approving a revised airport layout plan "that depict[ed] cargo building repositioning, but also show[ed] that Rest Haven Cemetery w[ould] remain in private ownership." The ROD also reaffirmed that there would be no basis for the mandatory reinterment of bodies at Rest Haven, and it assured that the cemetery would "remain available for future burials, and for visitation and care of the graves by members of the public." This convinced the district court that there was no longer a live controversy among Rest Haven, the City, and the FAA; it therefore dismissed all counts brought by Rest Haven in the first amended complaint with prejudice.

Like the district court, we see no reason why Rest Haven should not be dismissed from this litigation. Under Article III, § 2 of the United States Constitution, federal court jurisdiction is limited to "actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317 (1988). "[W]hen the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," the case is (or the claims are) moot and must be dismissed for lack of jurisdiction. *Powell v. McCormack*, 395 U.S. 486, 496 (1969); see also *Stotts v. Cmty. Unit. Sch. Dist. No. 1*, 230 F.3d 989, 990-91 (7th Cir. 2000). The fact that Rest Haven at one point was entitled to pursue this action makes no difference.

In order to satisfy Article III's jurisdictional requirements, "[t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980)). As of July 2005, "the dispute between the[se] parties no longer rages"; in fact, the FAA granted Rest Haven precisely the relief it wanted—the agency approved a layout plan that leaves it alone. *Holstein v. City of Chicago*, 29 F.3d 1145, 1147 (7th Cir. 1994). In fact, the ROD goes one step further: it requires the City to provide a road to the cemetery to allow continued access to its grounds and to ensure that its daily activities are not unduly disturbed by the surrounding construction. Once a plaintiff's entire demand is satisfied, "there is no dispute over which to litigate, and a plaintiff who refuses to acknowledge this loses outright, under FED. R. CIV. P. 12(b)(1), because he has no remaining stake." *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991); see also *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (noting that a case becomes moot when a court's decision can no longer affect the rights of litigants in the case before it and would be nothing but an advisory opinion on hypothetical facts).

In response to the district court's order to show cause why its claims should not be dismissed, Rest Haven complained that it was uncomfortable without an enforceable court order providing that "Chicago will preserve and leave forever undisturbed the graves of

the departed at Rest Haven," as well as an order requiring Chicago to "guarantee the Rest Haven plaintiffs continued access to the Rest Haven Cemetery." In its reply brief here, Rest Haven concedes that the City's representation that it will not acquire Rest Haven Cemetery "may moot the claim for injunctive relief." See *Brown v. Bartholomew Consol. Sch. Corp.*, 442 F.3d 588, 596 (7th Cir. 2006) ("In an action seeking only injunctive relief . . . once the threat of the act sought to be enjoined dissipates, the suit must be dismissed as moot."). At oral argument, however, Rest Haven appeared to defend the necessity of the order it requested on the ground that, without such an order, the City might unilaterally terminate its agreement not to condemn Rest Haven. This fear is motivating some of Rest Haven's religious adherents to bury their loved ones elsewhere out of fear of future disinterment.

If the City could change its mind at any time, Rest Haven might have a point. But that is not the case here. There is no indication on this record that the City has the authority to modify the airport layout plan without FAA approval. As the City represented at oral argument, it took approximately four years for the FAA to approve the plan at issue, and the City has no immediate intention to seek modification of the approved airport layout plan in favor of one that requires it to condemn the Rest Haven Cemetery. To the contrary, the City stated that it is quite eager to implement the approved plan. Rest Haven's fear that the City may one day change its mind and seek to acquire its cemetery is rooted in nothing but

speculation. In order to satisfy Article III's justiciability requirements, "[t]he injury or threat of injury must be both real and immediate, not conjectural or hypothetical." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). If and when the day comes when the City or some other governmental entity wants to condemn the Rest Haven Cemetery, Rest Haven will have ample opportunity to defend itself before all appropriate tribunals.

If what Rest Haven wants is a perpetual injunction against the City requiring it to leave its cemetery undisturbed until the end of time, it is overreaching. The power of eminent domain is a fundamental power of government, and a court cannot restrict future governmental authorities from its proper use. Moreover, any injunction issued by a court of equity is itself subject to later modification. See *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992); *New York State Ass'n for Retarded Children Inc. v. Carey*, 706 F.2d 956, 967 (2d. Cir. 1983) ("The power of a court of equity to modify a decree of injunctive relief is long-established, broad, and flexible."). Courts grant injunctive relief with the understanding that there will be an "opportunity for modifying or vacating [the] injunction when its continuance is no longer warranted." *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 298 (1941). Neither the district court nor this court is empowered to enjoin the City from *ever* seeking to acquire Rest Haven's property, no matter what the reason. Rest Haven also indicated at oral argument that it would be satisfied with a court order finding as a fact that there

would be a substantial burden to its First Amendment rights in the event of a future taking. This will not do. In the absence of a live controversy, such an order would be no more than an advisory opinion, which, as we are sure Rest Haven knows, federal courts are without constitutional authority to issue.

Rest Haven also argues that its claims are not moot because it wants a declaratory judgment establishing that OMA's amendment to IRFRA violates the First Amendment and the RLUIPA. This, at least, looks more like an ongoing controversy. Because Rest Haven did not advance this argument either before the district court or in its opening brief, however, we consider it waived. See *Nelson v. LaCrosse County Dist. Attorney*, 301 F.3d 820, 836 (7th Cir. 2002) (arguments raised for the first time in the reply brief are waived). Waiver or forfeiture aside, the argument has no merit. Even though *someone* may be affected by the IRFRA amendment, that "someone" is no longer Rest Haven, and it is well established that the "case or controversy" requirement applies to declaratory judgments, just as it applies to every other kind of litigation in federal court. See *Powell*, 395 U.S. at 518 ("The availability of declaratory relief depends on whether there is a live dispute between the parties. . . ."); see also *Tobin for Governor v. Ill. State Bd. of Elections*, 268 F.3d 517, 528 (7th Cir. 2001) (noting that a claim for declaratory judgment was moot where "relief . . . would have no impact on the parties to th[e] suit").

B. Municipal Plaintiffs and Rest Haven: FAA Claims

The district court also found that it lacked jurisdiction to review the Municipal Plaintiffs' and Rest Haven's claims against the FAA because these claims fell within the exclusive jurisdiction of the court of appeals under 49 U.S.C. § 46110. After dismissing Rest Haven from the litigation, the district court decided that it lacked jurisdiction to review the claims against the FAA that related to the issuance of the ROD. Because Rest Haven was not a party to this complaint, it has no "personal stake" in the appeal of the district court's denial of St. John's and the Municipal Plaintiffs' motion for leave to file a second amended complaint on this ground. See, *e.g.*, *Freedom from Religion Foundation, Inc. v. Bugher*, 249 F.3d 606, 609 (7th Cir. 2001) ("Under Article III, only a plaintiff with a personal stake in a case or controversy has standing."). Even if Rest Haven were a party to the second amended complaint and its claims were not moot, the district court would still lack jurisdiction to review either Rest Haven's or the Municipal Plaintiffs' claims against the FAA. The jurisdictional language in 49 U.S.C. § 46110 could not be plainer. It says that

> a person disclosing a substantial interest in an order issued by . . . the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator . . . in whole or in part under this part [or] part B . . . may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of

> appeals of the United States for the circuit in which the person resides or has its principal place of business.

49 U.S.C. § 46110(a). "Part B" refers to the Airport Development and Noise provisions of the same subtitle, see 49 U.S.C. § 47107, *et seq.*, which include the provision that grants the FAA the authority to review airport layout plans. See 49 U.S.C. § 47107(a)(16). The statute goes on to provide that the court of appeals has "exclusive jurisdiction to affirm, amend, modify or set aside any part of the order." 49 U.S.C. § 46110(a).

The Plaintiffs' arguments urging that the district court had the authority to consider these claims are without merit. First, Rest Haven argues that the federal RFRA, which Rest Haven claims the FAA has violated, commands that contested issues of fact pertaining to violations of that statute be tried in the federal district court. In support of this claim, they cite § 2000bb-1(c) of the Act, which provides that a person alleging a violation of RFRA "may assert that violation as a claim or defense in a judicial proceeding" and that standing to assert such a claim is "governed by . . . article III of the Constitution." Plaintiffs urge that this language means that they are entitled to an Article III proceeding in which to resolve disputed issues of fact. Even assuming that Rest Haven's claims are not moot, however, the statute says nothing about exclusive jurisdiction of district courts to find facts in RFRA cases. Review of an agency action in the court of appeals surely qualifies as an Article III judicial proceeding. Nothing in RFRA purported to repeal the authority of federal administrative agencies to find

facts, subject to review by the courts of appeals; there was no silent elimination of the judicial review provisions of the Administrative Procedures Act. See 5 U.S.C. § 706. Furthermore, the fact that Rest Haven's claims against the FAA include allegations that the FAA violated the Constitution does not allow it to "bypass the administrative process" because "[t]he effect would be that important and difficult constitutional issues would be decided devoid of factual content." *Gaunce v. DeVincentis*, 708 F.2d 1290, 1293 (7th Cir. 1983) (holding that exclusive jurisdiction rested in the court of appeals in a case in which a pilot challenged an FAA order revoking her flight certificate on due process grounds); see also *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215-16 (1994) (indicating that while the "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies," such a "rule is not mandatory," particularly when a plaintiff's "statutory and constitutional claims can meaningfully be addressed in the Court of Appeals") (internal citations omitted).

As further support for their argument that their claims against the FAA should be heard by the federal district court, both Rest Haven and the Municipal Plaintiffs contend that the misconduct of various FAA administrators made it impossible to develop the type of factual record necessary for meaningful appellate review. The Plaintiffs charge that the FAA has developed a compensation program that provides monetary rewards for FAA officials who make decisions that allow the construction of new runway projects;

that former Chicago employees (who had worked on previous O'Hare expansion projects) are currently FAA officials and employees; and that these administrators withheld thousands of documents that are not a part of the appellate record. Without the ability to present their claims to the district court, they fear, they will be stuck with the outcome of these tainted proceedings. Appellate courts, however, are certainly competent to hear a party's argument that there were flaws in due process at the agency level and remand the case to the agency with instructions to correct these problems. Additionally, any plaintiff can make an argument to the court of appeals that there were problems with the creation of the record before the administrative agency and thus in the record on appeal. See *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468-69 (1984) ("If, however, the Court of Appeals finds that the administrative record is inadequate, it may remand to the agency, see *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593-94 (1980), or in some circumstances refer the case to a special master, see 28 U.S.C. § 2347(b)(3)."). In fact, Plaintiffs made these arguments before the Court of Appeals for the D.C. Circuit, which rejected them. See *Bensenville*, 457 F.3d at 72-73.

Lastly, Plaintiffs argue that the district court at least has jurisdiction over their NEPA claims, pursuant to 40 C.F.R. § 1506.1. That regulation provides that "[u]ntil an agency issues a record of decision . . . no action concerning the proposal shall be taken which would [h]ave an adverse environmental impact; or [l]imit the choice of reasonable alternatives." According

to Plaintiffs, the FAA has not made a substantive funding decision about the disposition of certain passenger facility charges (PFC) that amount to more than one billion dollars. This is money that the City needs to facilitate Phase One of the OMP. Without the federal money, the City cannot proceed with the implementation of Phase One, which includes the acquisition of land from the Municipal Plaintiffs. Plaintiffs argue that the City is attempting to subvert the requirements of NEPA by adhering to a policy of "destruction before decision," in disregard of this court's ruling in *Old Town Neighborhood Ass'n v. Kauffman*, 333 F.3d 732 (7th Cir. 2003), disapproving such a strategy. The district court decided that it had no jurisdiction over this claim either.

Perhaps because events continue to unfold, the Plaintiffs' argument in this respect seems to have unraveled. The regulation to which Plaintiffs refer prohibits action in the absence of an agency's issuance of a ROD. Here, though, the ROD and the accompanying EIS have been issued. More than that, in an agreed order between these parties, the City stipulated that it "[would] not acquire property in the Village of Bensenville and Elk Grove Village for the OMP, or acquire the Rest Haven or St. Johannes Cemeteries, unless and until the FAA has issued a Record of Decision following completion of an EIS for the OMP." At oral argument the FAA directed the Court's attention to § 12.3 of the ROD where the FAA made specific factual findings on the airport layout plan's effect on natural resources, in compliance with 49 U.S.C. § 47106(c)(1)(B). Plaintiffs contend that this

does not do the job, because while environmental findings have been made with respect to the airport layout plan, those findings did not focus on the specific project for which the City is seeking funding—the Phase One Project. Based on our reading of the record, however, the Phase One Project is a part of the airport layout plan for which the City has received FAA approval. Furthermore, the regulation does not prohibit action until the FAA has made *all* decisions with respect to funding; it says only that no action can be taken before the issuance of the ROD, which we now have. If these Plaintiffs wanted to challenge the environmental findings made by the FAA, they certainly could have included those claims in the petition for review of the ROD that they filed in the D.C. Circuit.

This shows Plaintiffs' NEPA challenge for what it is: a matter so intertwined with the ROD that it falls within the exclusive jurisdiction of the court of appeals. If we needed further reassurance on the point, we have it in the fact that Plaintiffs actually made the identical argument about NEPA compliance in their presentation to the D.C. Circuit. There, they argued that the FAA violated NEPA by issuing a ROD that approved of the airport layout plan without making any formal funding decisions. Before the district court and on appeal here, they argue that the FAA is violating NEPA by allowing the City to proceed with the acquisition of property in these villages before a funding decision has been made. Even if we did not think that this issue was under the court of appeals' exclusive jurisdiction, we do not think it wise to allow

either the Municipal Plaintiffs or Rest Haven to litigate the same issues, either concurrently or *seriatim*, in separate federal courts.

IV

We turn now to St. John's part of this case. The first question is whether St. John's is entitled, as a matter of state law, to the protection afforded by the Illinois Religious Freedom Restoration Act, 775 ILCS 35/30. If the OMA's amendment of IRFRA can withstand legal challenge, then the answer must be no; if not, then St. John's may have a point. Before the district court, St. John's argued that the OMA's amendment of IRFRA violated the Free Exercise Clause of the First Amendment. The Free Exercise Clause prohibits the government from "plac[ing] a substantial burden on the observation of a central religious belief or practice" without first demonstrating that a "compelling governmental interest justifies the burden." *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989). In *Employment Division v. Smith*, 494 U.S. 872 (1990), however, the Supreme Court held that neutral laws of general applicability do not run afoul of the Free Exercise Clause, even if these laws have the incidental effect of burdening a religious practice. *Id.* at 883; see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). In order to determine whether a law is neutral, as the Court used the term in *Smith*, we must examine the object of the law. A law is not neutral if "the object of the law is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. The related principle of "general applicability" forbids the

government from "impos[ing] burdens only on conduct motivated by religious belief" in a "selective manner." *Id.* at 543; see also *id.* at 531 ("Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied.").

The Illinois legislature passed IRFRA in 1998 in response to both *Smith* and the Supreme Court's subsequent invalidation (as applied to the states) of the federal Religious Freedom and Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb, *et seq.* See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that RFRA, as it applied to the states and their subdivisions, exceeded Congress's remedial powers under the Fourteenth Amendment). RFRA had been Congress's attempt to impose what it understood to be the pre-*Smith* "compelling interest test" to state measures affecting religious practices. Under RFRA, a governmental unit could not "substantially burden a person's exercise of religion even if the burden result[ed] from a rule of general applicability . . . unless [the government's action was] in furtherance of a compelling governmental interest and [was] the least restrictive means of furthering that . . . interest." 42 U.S.C. § 2000bb-1; see also *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Since the holding of *Boerne* was predicated on the scope of Congress's powers under section 5 of the Fourteenth Amendment, the Illinois legislature reasonably concluded that *Boerne* said nothing about its own ability under Illinois's Constitution to enact a measure affording special protection to religion. It did

so in IRFRA, using language that mirrors that of the federal RFRA. See 775 ILCS 35/15 ("Government may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest."). The legislation was expressly designed to afford greater protection to religious activity in Illinois than *Smith* holds is required under the federal Constitution. The legislature acted again in the OMA, however, taking back part of what IRFRA gave: it put religious institutions on the same footing as all other property owners for purposes of the O'Hare project. The OMA accomplishes this goal by adding a new § 30 to IRFRA; the new section states that nothing in IRFRA "limit[s] the authority of the City of Chicago to exercise its powers under the [OMA] for the purpose of relocation of cemeteries or graves located therein." 775 ILCS 35/30. As St. John's points out, the OMA also mentions cemeteries in § 92, which amends the Illinois Municipal Code, 65 ILCS 5/11-51-1, by allowing the City to remove cemetery remains for airport expansion without the assent of cemetery trustees or owners.

According to St. John's, a major tenet of its religious beliefs is that the remains of those buried at the St. Johannes Cemetery must not be disturbed until Jesus Christ raises these remains on the day of Resurrection. It asserts therefore that the City's plan to acquire and condemn the cemetery is a "sacrilege to

[its] religious faith." We accept those representations. St. John's continues with a claim that the OMA impermissibly targets the religious cemeteries adjacent to O'Hare, stripping them of the protection under IRFRA that is afforded to every other religious institution, including other religious cemeteries, in Illinois. The district court decided, however, that this was the wrong perspective: it saw no discrimination or targeting of religious institutions because *any* property, religious or otherwise, within the area designated for O'Hare expansion is subject to the extraordinary powers conferred in the OMA. It therefore dismissed all counts in the first amended complaint that asserted a free exercise violation and similarly denied the motion for leave to file a second amended complaint with respect to the free exercise claims, concluding that the Plaintiffs failed to state any free exercise claim on these facts.

Throughout these proceedings, St. John's has insisted that the relevant comparison is between the two cemeteries potentially affected by the O'Hare project and all other cemeteries or religious properties in the state. But this assumes the answer to the crucial question: what is the proper comparison to make?[2] *Lukumi* requires us to approach that question by asking whether the object of the OMA was "to infringe upon or restrict practices because of their religious motivation." 508 U.S. at 533. In looking at OMA, we

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[2] Our dissenting colleague answers this critical question in St. John's favor. For the reasons we set forth in the discussion that follows, we conclude that the City has the better of the argument.

must consider the act as a whole, as well as the part that the new § 30 of IRFRA (added by § 96 of the OMA) plays in it.

We begin, as *Lukumi* instructs, with the text of the OMA. As we noted earlier, the new § 30 of IRFRA says simply "Nothing in this Act limits the authority of the City of Chicago to exercise its powers under the O'Hare Modernization Act for the purposes of relocation of cemeteries or the graves located therein." In our view, this language does not "refer[ ] to a religious practice without a secular meaning discernible from the language or context." *Lukumi*, 508 U.S. at 533. Some cemeteries are affiliated with religious sects, others are not; even graves in cemeteries with a religious affiliation may be relocated because of natural necessity, for public health concerns, after a hurricane or flood, or for many other private or public reasons. We conclude there is nothing inherently religious about cemeteries or graves, and the act of relocating them thus does not on its face infringe upon a religious practice, as *Lukumi* uses that term. (We acknowledge the fact that the OMA addresses only cemeteries that are entitled to invoke the protections of IRFRA, but that is only because secular cemeteries presumably would have no extraordinary defense to the power of eminent domain to begin with.) We note in this connection that the Supreme Court held in *Lukumi* that the words "sacrifice" and "ritual" were not so closely associated with religious practice that a finding of facial non-neutrality was compelled. *Id.* at 534. If that was the case there, then it is straightforward here to conclude that the OMA is facially neutral.

Even if a law passes the test of facial neutrality, it is still necessary to ask whether it embodies a more subtle or masked hostility to religion. See, *e.g.*, *Gillette v. United States*, 401 U.S. 437, 452 (1971) (indicating that the Free Exercise Clause "forbids subtle departures from neutrality"); see also *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (noting that the First Amendment prohibits the government from engaging in the "covert suppression of particular religious beliefs"). To answer that question, we must look at available evidence that sheds light on the law's object, including the effect of the law as it is designed to operate, the "historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the [act's] legislative or administrative history." *Lukumi*, 508 U.S. at 540. Perhaps the most important of these sources is the remainder of the statute of which the new § 30 is a part. The OMA in its entirety is the law that the Illinois General Assembly passed; by relying on it we do not run the risk of selective use of statements in legislative history that might not reflect the intent of the legislature. The Supreme Court took this approach when it reviewed the Free Exercise and Establishment Clause claims in *Locke v. Davey*, 540 U.S. 712 (2004). There, although the petitioner challenged only the specific statutory provision of a scholarship program that prohibited recipients from pursuing post-secondary degrees in theology, the Court observed that "the *entirety* of the Promise Scholarship Program goes a long way toward including religion in its benefits." *Id.* at 724 (emphasis added).

Although St. John's alleges in its complaint that the City targeted its religious rights when the City asked the Illinois General Assembly to amend IRFRA as part of the OMA, in reviewing the sufficiency of the complaint "we are not obliged to accept as true legal conclusions or unsupported conclusions of fact." *Hickey v. O'Bannon*, 287 F.3d 656, 658 (7th Cir. 2002). There are simply no facts in the voluminous record on appeal that support any such claim of targeting religious institutions or practices. According to its stated purpose, the OMA was enacted, in part, to insure that "legal impediments to the completion of the [O'Hare] project be eliminated." OMA § 5(b). As we noted earlier, most of the OMA's provisions have absolutely nothing to do with religion, cemeteries, or IRFRA. See, *e.g.*, *id.* § 20 (prohibiting local government units, other than the City of Chicago, from condemning property that is slated to become part of O'Hare); *id.* § 94 (amending the Illinois Aeronautics Act, 620 ILCS 5/38.01, to exempt project applications under the provisions of the Airport and Airway Improvement Act submitted in connection with the OMP from the general requirements for such applications); *id.* § 95 (amending the Illinois Code of Civil Procedure to include a quick-take provision for property condemned for the OMP). In fact, the record as a whole strongly supports the position the City has urged throughout these proceedings: the OMA was designed to remove any and all state-law based impediments to the O'Hare expansion project, no matter what their source.

St. John's makes the obvious point that, as matters have developed, it is now the only cemetery in the

State of Illinois affected by the new § 30 of IRFRA. That is true, but an "adverse impact will not always lead to a finding of impermissible targeting." *Lukumi*, 508 U.S. at 535. In fact, if this point matters at all, it may cut in favor of the City. As St. John's repeatedly mentions in its brief, no other religious cemetery in Illinois, including other cemeteries similarly affiliated with the United Church of Christ, is affected by the OMA. The fact that the legislation leaves other religious cemeteries untouched (including those affiliated with churches or other religious institutions that hold similar beliefs with respect to burial grounds) reinforces the proposition that the legislature had the nondiscriminatory purpose of clearing all land needed for O'Hare's proposed expansion. If there were ten cemeteries in that area, then the new § 30 would apply to all ten; while there were two, it applied to both. We conclude that the OMA, including the portion that amends IRFRA, is a neutral law of general applicability. The Illinois legislature was entitled to restore Illinois law to the regime governed by *Smith* in order to facilitate the airport project.

Although we think it unnecessary to ask whether the plan passes the strict scrutiny test, and whether the City has shown that it is the least restrictive means of furthering a compelling governmental interest, we add for the sake of completeness that we agree with the FAA's conclusion in the ROD that the plan passes muster. Unlike our dissenting colleague, we see no disputed issues of material fact that would require further proceedings.

Virtually all involved parties, from the competent committee in Congress, to the FAA, to the State of Illinois, to the City of Chicago, have made a compelling case that the OMP addresses a serious problem with national—indeed international—consequences. O'Hare is a vital transportation link for the Midwest region, for North America, and for the world. It is the only airport in the United States that is the hub of two major airlines. Serving 47 scheduled passenger airlines and 23 cargo carriers, O'Hare provides nonstop service to 127 domestic and 48 international destinations. In part because Chicago is the largest population and economic center in the middle of the country, O'Hare "plays an important role in the National Airspace System (NAS) as a dual airline hub, a major mid-continent market for nearly every major airline, and a key international gateway."

O'Hare is not only one of the busiest airports in the world. Unfortunately, recently it has also become one of the most congested. Its delay record is at least twice as bad as that of the next two airports that suffer from excessive delays, Atlanta and Newark. Nearly 70,000 airport operations at O'Hare were delayed in 2004, for a total of almost 4,000,000 minutes. As the OMA states, "The reliability and efficiency of air transportation for residents and businesses in Illinois and other States depend on efficient air traffic operations at O'Hare." 620 ILCS 65/5. Approximately 51% of total passengers traveling through O'Hare connect to and from other airports. As a major international gateway, the effects of the congestion at O'Hare are far-reaching. Delays at O'Hare spark

further delays around the country and the world, with serious economic and logistical consequences. According to the ROD, "O'Hare has consistently been the number one problem related to delays with the National Airspace System in the United States today." Moreover, the problem seems unlikely to abate; the FAA believes that "[a]ir traffic at O'Hare is projected to increase in the future from some 31 million passengers and 922,787 operations in 2002 to some 50 million passengers and 1,194,000 operations by 2018." Many who have tried to connect through O'Hare have learned the hard way that the airport simply lacks the capacity to accommodate all the demand for its services. It is for these reasons that the FAA concluded that the state interests at stake are compelling and agreed to fund one of the largest and most costly reconfigurations of an airport in the United States.

The routes and networks that have developed around O'Hare are vast and entrenched. The FAA considered the option of diverting air traffic to other regional airports or mid-continent hubs, but it found that local, national and international dependence on O'Hare as a national connecting hub and international gateway had developed to the point of making those ideas effectively unworkable. To borrow a concept from the "essential facilities" doctrine in antitrust law, as a practical matter it is impossible reasonably to duplicate O'Hare in a way that meets the crushing demand for its important services. Compare *MCI Commc'ns Corp. v. AT&T Co.*, 708 F.2d 1081, 1132 (7th Cir. 1983). If the decision were ours to make (a proposition that we find doubtful), rather than that of the FAA or the competent

authorities in Chicago and Illinois, we would find that there really is "no realistic, economically practical alternative," *City of Malden, Missouri v. Union Electric Co.*, 887 F.2d 157, 163 n.6 (8th Cir. 1989), to the restructuring of O'Hare to remedy those concerns. Given O'Hare's unique importance to the national transportation infrastructure, we are persuaded that the City and State have a compelling interest in fixing the problems from which O'Hare suffers.

Even if the need is compelling, if IRFRA applied it would be necessary to decide whether the OMP is the least restrictive alternative. St. John's has offered no plausible evidence to suggest that it is not. See *Bell Atlantic*, 127 S. Ct. at 1974. The City and its many partners carefully considered the concerns of the religious entities in an exhaustive review. They studied the alternatives thoughtfully, adopted some of them, and came up with a final plan that represents the City's best effort to be solicitous of the religious concerns involved without substantially undermining the goals of the overall project. See *Bensenville*, 457 F.3d at 72 (stating that the FAA "appears to have acted with great care in conducting its analyses for the EIS and ROD" in this case). Cf. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453-55 (1988) (noting that where the government commissioned a comprehensive study of the effects its proposed road would have on the religious concerns at issue and had planned numerous ameliorative measures to mitigate the intrusion as much as possible, "it is difficult to see how the Government could have been more solicitous"). The City discarded

its original plan to relocate air cargo facilities to the Rest Haven site, after the FAA concluded that "there is a measure of flexibility in the design and location of these buildings sufficient to accommodate the religious liberty interests without impeding the air cargo component" of the overall plan. Accordingly, Rest Haven was spared in an effort to tailor the plan in as accommodating a manner as possible.

Unfortunately, geography and the needs of the expansion project made it impossible similarly to accommodate the St. Johannes cemetery. The FAA's review of alternative proposals illustrates, however, that this conclusion was not reached lightly. The proposals attempted to minimize encroachment on the St. Johannes cemetery as much as possible by considering options that would have shifted, shortened, or eliminated various runways or other parts of the overall plan. For example, one alternative called for moving a key runway about 400 feet to the south and shortening it to avoid the St. Johannes cemetery. The FAA found that doing so would have moved the runway into protected space for a new air control tower that could not be moved without running afoul of FAA safety standards. According to the ROD, the ultimate result would have "compromis[ed] the efficiency and capacity of [other] runways in poor weather." The ROD noted that the responses to these concerns "demonstrate [d] an unfamiliarity with the real-world situation of operating a major airport in both a safe and efficient manner." Another proposal suggested simply shortening the runway without moving it to another part of the airport. The FAA found that this

alternative would "place severe operating constraints on the airfield any time weather conditions presented a ceiling below 4,500 feet and less than 7 miles of visibility" which "would not accommodate anticipated growth in aviation activity at acceptable levels of delay."

More creative possibilities were considered as well, such as simply constructing a necessary runway on the surface of the cemetery ground without disturbing the bodies underneath. Even though this would have made access to and future use of the cemetery impossible and may also have offended religious sensibilities, some thought that this proposal was less restrictive because the bodies would remain untouched. The FAA consulted the Tennessee Valley Authority, a federal agency with considerable experience in cemetery relocation (derived over many years of building hydropower facilities in areas where cemeteries were located), about this idea. The concept proved to be infeasible as a matter of engineering. The FAA concluded that "the depth of excavation needed for runway construction, along with the ancillary activities such as electrical cabling for airfield runway lighting and storm sewer pipes for airfield drainage, presented a substantial likelihood that the graves could be disturbed."

It is significant that this case involves physical intrusion on a religious site, not the curtailment or prohibition of a religious practice. The least restrictive alternative analysis here comes down to concrete measurements. The question is whether there is a way to construct the vitally needed new runways and

supporting structures at O'Hare—a defined physical space—in a way that limits or avoids entirely physical encroachment on an adjacent geographical area. An airport layout and runway configuration is an intricate web of interrelated parts where placements and measurements are carefully calibrated to account for variables such as wake turbulence, weather, and visibility, as well as the size, speed, and schedules of departing and arriving aircraft. The entire project is constrained by demanding FAA standards. As the ROD explains, "a change in one runway often has consequences for other runways, nearby taxiways, and the overall ability to handle greater levels of traffic." Each alternative proposal fell victim to that reality. The City has demonstrated that it has accommodated the religious concerns as much as is physically possible without compromising its compelling interests. The only plausible conclusion that the pleadings support is that the OMP represents the least restrictive alternative.

Lastly, St. John's argues that the district court erred in concluding that in order to state a free exercise claim a plaintiff must allege two things: (1) that the defendant's actions were motivated by animus or prejudice, and (2) that the law at issue is not neutral or of general applicability. The first of these, it asserts, is precluded by cases such as *Shrum v. City of Coweta, Okla.*, 449 F.3d 1132 (10th Cir. 2006). There, the Tenth Circuit observed that "the Free Exercise Clause has been applied numerous times when government officials interfered with religious exercise not out of

hostility or prejudice, but for secular reasons." *Id.* at 1144.

With respect, we think that St. John's has misread the district court's opinion. Only after the court decided that the OMA was a neutral law of general applicability did it observe that "none of the allegations in the complaint give[s] rise to the inference that the facially neutral language masks more insidious underpinnings." This comment reflects the inquiry required by *Lukumi.* The district court was not suggesting that a plaintiff is *required* to allege animus or prejudice in order to state a free exercise claim.

In fact, a closer look at *Shrum* reveals that it is not of much help to St. John's. In that case, the plaintiff, a police officer and minister, alleged that he was assigned to a day shift precisely because this schedule would conflict with his ministerial duties. Although the defendant gave a neutral justification for the assignment, the plaintiff's allegation was that the decision to reassign him was "motivated by [plaintiff]'s religious commitments." *Id.* at 1144. A question therefore existed with respect to whether the decision at issue was actually neutral and of general applicability; the court had no need to require the plaintiff also to allege that the assigning officer had held his faith against him or had acted out of religious prejudice. The problem was that the assigning officer wanted to force the plaintiff to choose between his duties as a police officer and his post as a minister and "religious discrimination was the means to [that] entirely secular end . . . ." *Id.* Here, in contrast, St. John's does not allege that the City is seeking to

acquire its land *because* of its religious significance; the City needs the land *in spite of* its current dedication to religious use. *Cf. Personnel Adm'r. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (" 'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.") (internal citation omitted). There are no facts in this record that could support such a claim.

V

Moving on from its free exercise challenge to the OMA's amendment of IRFRA, St. John's argues that the OMA violated the Fourteenth Amendment's Equal Protection Clause when it deprived St. John's of constitutional and statutory legal protections that are available to every other cemetery in the state. The district court dismissed this aspect of the case, in both the original and the second amended complaint, for failure to state a claim upon which relief could be granted. The court's error in this respect, according to St. John's, was its failure to review the equal protection theory using strict scrutiny.

In deciding whether the OMA violates the Equal Protection Clause, our first question is whether the act targets a suspect class or addresses a fundamental right. See *Eby-Brown Co., LLC v. Wisc. Dep't of Agric.*, 295 F.3d 749, 754 (7th Cir. 2002). If it does either of these things, then the legislation must survive more

demanding scrutiny. Normally, this means that it must be tailored narrowly to facilitate a compelling state interest. See *Krislov v. Rednour*, 226 F.3d 851, 863 (7th Cir. 2000). If no fundamental rights or suspect categories are at issue, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

St. John's first tries to repackage its free exercise argument in equal protection language, by claiming that the new § 30 unduly burdens its fundamental right freely to exercise its religion. We have already rejected the underlying point, however. "Where a plaintiff's First Amendment Free Exercise claim has failed, the Supreme Court has applied only rational basis scrutiny in its subsequent review of an equal protection fundamental right to religious free exercise claim based on the same facts." *Wirzburger v. Galvin*, 412 F.3d 271, 282-83 (1st Cir. 2005) (citing *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974)).

St. John's also argues that the new § 30 targets a suspect class, namely, the two religious cemeteries adjacent to O'Hare. It has not fleshed out this argument particularly well. If it means to suggest that "cemeteries adjacent to O'Hare" constitute a constitutionally suspect class, we must disagree with it. A suspect class either "possesses an immutable characteristic determined solely by the accident of birth," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), or is one "saddled with such disabilities, or

subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). Although religion may fit the bill, see, *e.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976), strict scrutiny has been reserved for laws that "discriminat[e] among religions." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987). The new § 30 neither classifies on the basis of religion nor discriminates among religions.

Once again, St. John's notes that it is the only religious cemetery currently affected by the OMA; other religious cemeteries in the state, including those affiliated with the United Church of Christ, are beyond the statute's reach. As was the case with respect to its free exercise claim, St. John's own argument proves that this statute does not treat St. John's differently from other religious cemeteries in the state *because* it is a religious cemetery. Rather the statute puts St. John's in a different position from other religious cemeteries in the state because it is near O'Hare and, unlike the Rest Haven Cemetery, the City badly needs the land to construct additional runways. Geography, however, is not a suspect class for equal protection purposes. If St. John's is attempting to state a "class of one" equal protection claim, see *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000), it has failed to do so. This court has held that "[a] class of one equal protection claim may be brought where (1) the plaintiff

alleges that he has been intentionally treated differently from others similarly situated and (2) that there is no rational basis for the difference in treatment or the cause of the differential treatment is a 'totally illegitimate animus' toward the plaintiff by the defendant." *Lunini v. Grayeb*, 395 F.3d 761, 768 (7th Cir. 2005) (quoting *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1001 (7th Cir. 2004)). Even if St. John's could satisfy the first part of that test, it cannot survive the second part.

The fact that this statute affects a religious group or institution does not necessarily mean that the statute classifies on the basis of religion. See, *e.g., Johnson*, 415 U.S. at 375 n.14 (declining to categorize group of religious conscientious objectors as a suspect class); *Locke*, 540 U.S. at 712 (applying rational basis review to a statute that prohibited state aid to any post-secondary student pursuing a degree in theology). As we observed earlier, in a case like this, where a facially neutral statute is challenged on equal protection grounds, the challenger must prove that the legislature "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279. Nothing supports the proposition that the Illinois legislature singled out St. John's for lesser protection under IRFRA protection *because* it runs a religious cemetery. Anyone or anything standing in the way of the O'Hare project faces the prospect of the City's exercise of its eminent domain power. We have no doubt that the legislature was unmoved by St. John's religious affiliation.

In order to survive a motion to dismiss for failure to state an equal protection claim, "a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications." *Wroblewski v. City of Washburn*, 965 F.2d 452, 460 (7th Cir. 1992). As the district court observed, St. John's does not even attempt to argue that the OMA's amendment to IRFRA is not rationally related to some legitimate government purpose. Certainly, the expansion of O'Hare is a legitimate state purpose. As a classic "public use"—an airport to be operated by the City of Chicago for the benefit of local, national, and international transportation—it does not raise any of the questions that concerned the dissenting Justices in the Supreme Court's decision in *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005). Enacting a statute that removes legal barriers to the City's ability to acquire land in connection with the expansion of the airport is not "wholly impossible" to relate to that legitimate interest. *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 766 (7th Cir. 2003).

VI

Last, St. John's invokes the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc, *et seq.* Congress enacted RLUIPA after the Supreme Court invalidated the federal RFRA, 42 U.S.C. § 2000bb, *et seq.*, as it applied to the states and their subdivisions in *City of Boerne*, 521 U.S. 507. "Less sweeping" than RFRA, RLUIPA is limited to cases involving land use regulations or the religious exercise rights of institutionalized persons. It applies when a substantial burden to religious exercise is

"imposed in a program or activity that receives Federal financial assistance," affects interstate commerce, or, in a case involving a land use regulation, is imposed pursuant to a procedure that permits the government to make "individualized assessments of the proposed uses for the property involved." 42 U.S.C. §§ 2000cc1(b)(1)-(2), 2000cc(a)(2)(A)-(C).

The question before us is whether the "land use" part of RLUIPA applies here. That part of the statute prohibits any government from implementing a "land use regulation" that "imposes a substantial burden on the religious exercise of a person," as well as on religious assemblies and other religious institutions, unless the government can show that the "imposition of the burden on that person, assembly, or institution is in furtherance of a compelling governmental interest [ ] and is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1). We must decide whether the City's plan to condemn the St. Johannes Cemetery is a "land use regulation" within the meaning of RLUIPA. We agree with the district court's conclusion that it is not.

Initially, we note that we are proceeding on the assumption that RLUIPA as a whole does constitutionally apply to the states. In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the Supreme Court held that § 3 of RLUIPA, which deals with the religious exercise rights of institutionalized persons, is constitutional as applied to the states. The Court specifically declined to express any view on the validity of § 2 of the statute, which deals with land use regulations. 544 U.S. at 715 n.3. Neither party has

raised any challenges to the constitutionality of § 2; because we conclude that the statute does not apply here, we save for another day the question whether this part of the statute may be applied to the states.

The term "land use regulation" is defined by RLUIPA as follows:

> [A] zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

42 U.S.C. § 2000cc-5(5). St. John's (as well as the Municipal Plaintiffs and Rest Haven, for that matter) have not objected, however, to any plan on the City's part to zone their property in an unfavorable way or to impose restrictions on it under a landmarking law. St. John's claims instead that the OMA is a "zoning-type law" because it changes the permitted use of its land from a religious cemetery to land designated as "airport property." But this is a misleadingly incomplete description of the City's intentions under the statute. The fact that the OMA refers to the land it seeks to acquire from everyone living within the footprint of the O'Hare expansion project as "airport property" does not morph the OMA into a zoning ordinance. The City is not attempting to dictate to these plaintiffs what they are permitted to do with the plot of land that is currently the St. Johannes Cemetery; rather, the City seeks to exercise its takings

power to assume full ownership of the land, after paying St. John's just compensation. As Illinois courts have long recognized, the "police power [zoning] and eminent domain are distinct powers of government." *Sanitary Dist. of Chi. v. Chi. & Alton R.R. Co.*, 108 N.E. 312, 314 (Ill. 1915) ("Whatever restraints the Legislature imposes upon the use and enjoyment of property with the reason and principle of this duty the owner must submit to. It is a regulation, and not a taking; an exercise of police power, and not of eminent domain."). Because zoning and eminent domain are "two distinct concepts" that involve land "in very different ways," we reject the argument that the City's plan to condemn the St. Johannes Cemetery under the OMA is an act of zoning. *Faith Temple Church v. Town of Brighton*, 405 F. Supp. 2d 250, 254 (W.D.N.Y. 2005).[3]

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[3] Some argue that the two concepts are not so distinct, and that the problem with zoning is that it forces property owners to limit the uses to which they put their property. In that sense, the argument goes, zoning regulations are in fact partial takings of private property. See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 100-03 (1985).

Professor Epstein argues that what government should do in lieu of zoning is use its power of eminent domain, assuming of course that there is a valid public purpose and the government is willing to pay. He recognizes that the law has not adopted his theory, however, noting that "the dominant line of opinion—one that can be traced to Justice Holmes in [*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)]—is that regulation, far from being a subclass of takings, is outside the scope of the eminent domain clause unless it is taken 'too far.'" *Id.* at 102.

St. John's argument runs in the other direction; it claims that the exercise of eminent domain in this case has essentially zoned

St. John's relies on a district court case from the Southern District of Indiana for the sweeping proposition that "[w]hen an ordinance constitutes an attempt by the government to regulate the use of a piece of property, it is an act of zoning." *Sagamore Park v. City of Indianapolis*, 885 F. Supp. 1146, 1150 (S.D. Ind. 1994). That decision, however, is inapposite. It addressed the question whether a moratorium imposed by the Board of Zoning Appeals amounted to an act of zoning; it had nothing to do with the question whether an exercise of the sovereign power of eminent domain should also be regarded as "zoning."

In addition to arguing that the OMA is a zoning law, the Plaintiffs contend that eminent domain itself is a "land use" regulation under RLUIPA. Their best authority for this point is a footnote in a district court case from the Central District of California, *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002). Briefly, in that case, the plaintiff, Cotton-wood Christian Center, wanted to build a church on an 18-acre parcel of land that it owned. The City of Cypress planned to use that land for commercial retail space and initiated eminent domain proceedings. The plaintiff brought an action for a preliminary injunction after the City denied it the necessary land use permit it needed to begin

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away its entire property. But the City has paid just compensation for what it has taken in this case, which is exactly what distinguishes it from a zoning regulation that has gone "too far." It would strain the statutory definition beyond repair to equate a buy-out with a "limitation" or "restriction" on land use.

constructing its place of worship. The district court found that the City's refusal to grant Cottonwood's application for a conditional use permit was a land use regulation subject to RLUIPA. In a footnote, the court commented that "[e]ven if [it] were only considering the condemnation proceedings, they would fall under RLUIPA's land use regulation." *Cottonwood*, 218 F. Supp. 2d at 1222 n.9.

We are not persuaded by the district court's brief dicta in *Cottonwood* that eminent domain is always and inevitably a land use regulation under RLUIPA. Given the importance of eminent domain as a governmental power affecting land use, we think that if Congress had wanted to include eminent domain within RLUIPA, it would have said something. Indeed, before federal law (even under the Spending Clause) starts interfering with the fundamental state power of eminent domain, it is likely that we would need a clear statement from Congress. See, *e.g.*, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) ("[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government,' it must make its intention to do so unmistakably clear in the language of the statute.") (internal quotation omitted). Congress did not mention eminent domain in so many words in RLUIPA's definition of a land use regulation, which is enough for us to consider it excluded. See *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) ("It is well established that where the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms."). The handful of federal and state cases that have addressed

this question have reached the same conclusion that we have. See, *e.g.*, *Faith Temple Church*, 405 F. Supp. 2d at 255 ("By its terms . . . RLUIPA does not apply to eminent domain proceedings."); *City and County of Honolulu v. Sherman*, 129 P.3d 542, 547 (Haw. 2006) ("RLUIPA is not available as a defense to condemnation . . . ."); see also *Prater v. City of Burnside, Ky.*, 289 F.3d 417, 434 (6th Cir. 2002) (although not specifically addressing the question whether condemnation is a land use regulation under RLUIPA, indicating that the City's property interest in the land at issue gave it the right to develop the land as it desired and thus the City's decision to develop the roadway was not based on any zoning or landmarking law). Because this case does not involve a "land use regulation," there is no need for us to address RLUIPA's other element—whether the City's proposed actions will substantially burden Plaintiffs' religious exercise.

With RLUIPA inapplicable, we have exhausted the possible reasons why the St. Johannes Cemetery might be exempt from the City's general eminent domain power. Over the years, Illinois has condemned cemeteries, both religious and otherwise, for a variety of public uses, such as highways. See, *e.g.*, *Illinois State Toll Highway Comm'n v. Eden Cemetery Ass'n*, 158 N.E.2d 766 (Ill. 1956) (oft-cited case about the appropriate uses of the state's eminent domain power involving condemnation of a religious cemetery); *Dep't of Transp. v. Bouy*, 386 N.E.2d 1163 (Ill. App. Ct. 1979) (resolving methods government was required to use to determine the market value and appropriate

compensation for the partial taking of a cemetery to provide land for a highway). We recognize that relocating St. Johannes will be a sensitive and labor intensive task. The City has established a detailed protocol, which includes identifying the next of kin for each person buried at the cemetery and hiring professional archaeologists and a licensed funeral director to carry out archaeological work and disinterments for each person buried there. At oral argument, the City assured us that it will comply with these procedures. We take the City at its word and trust that this process will be carried out with dignity and respect for both living and dead. Of course, the plaintiffs remain free to challenge any deviation from the City's proposed methods of relocation before an appropriate tribunal should some controversy arise in the future.

Given our conclusion that none of St. John's religious claims against the City survives, the district court was correct to deny its motion for a preliminary injunction.

VII

Accordingly, we AFFIRM the judgment of the district court.

RIPPLE, Circuit Judge, concurring in part and dissenting in part. I join my colleagues in affirming the judgment of the district court with respect to the claims by Rest Haven and the municipal defendants. However, I believe that the amendments to the Illinois

Religious Freedom Restoration Act ("Illinois RFRA") made in the O'Hare Modernization Act ("OMA"), Ill. Pub. Act No. 093-0450, violate the Free Exercise Clause, and, for that reason, must be subject to strict scrutiny. I further believe that there remain factual questions regarding whether the City of Chicago ("City") has shown that the proposed modernization and expansion plan of O'Hare Airport is narrowly tailored to meet the compelling interest the City claims. These factual issues render dismissal inappropriate at this stage in the litigation. Therefore, I respectfully dissent.

I
BACKGROUND

The majority's thoughtful and comprehensive opinion sets forth the facts of this case in great detail; therefore, I shall provide only a brief description of the pertinent facts.

In May 2003, the Illinois General Assembly enacted the OMA. The legislation amended various provisions of Illinois law to facilitate the planned expansion of O'Hare Airport. One of the legal impediments that this legislation sought to remove was a restriction on the power of the City to condemn particular properties for the expansion, including two religiously-affiliated cemeteries, one of which, St. Johannes Cemetery ("St. Johannes"), is owned by St. John's United Church of Christ ("St. John's"). Among the changes aimed at facilitating the condemnation of these cemeteries was an amendment to the Illinois RFRA that repealed otherwise generally applicable statutes only with

respect to the relocation of cemeteries in connection with the O'Hare expansion.

St. John's and two of its congregants[1] filed this action, challenging both the City's attempt to acquire the land on which St. Johannes is located and the amendment to the Illinois RFRA. St. John's asserted that the City's actions violated its rights under the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.[2] St. John's maintains that the relocation of St. Johannes would violate a major tenet of its religious beliefs, which requires that those buried in St. Johannes must remain undisturbed until resurrected by Jesus Christ on the Last Day. St. John's further contended that, because the amendments to the Illinois RFRA singled out religious cemeteries near O'Hare, the law was not neutral and of general applicability, and therefore subject to strict scrutiny under the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

The district court dismissed St. John's complaint for failure to state a claim. The district court concluded

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[1] Because the congregants assert the same claims as St. John's, I shall refer, for ease of reference, to the plaintiffs collectively as St. John's.

[2] The owner of the second cemetery, Rest Haven Cemetery Association, originally joined St. John's in these claims. As noted by the majority opinion, the City no longer seeks to acquire the land on which Rest Haven is located, rendering Rest Haven's challenges moot.

that the OMA was a neutral law of general applicability; thus, it was subject only to rational basis scrutiny under both the Free Exercise Clause and the Equal Protection Clause.

II
DISCUSSION

The First Amendment ensures religious freedom by firmly committing the state to a position of neutrality in the relationship between individuals and religion. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226 (1963). The Supreme Court has observed that, with respect to religious freedom, the principle of government neutrality, the government "protect[s] all, it prefers not, and it *disparages* none." *Id.* at 215 (quoting *Minor v. Bd. of Educ. of Cincinnati* (Super. Ct. of Cincinnati, February 1870) (Taft, J., dissenting) (unpublished case), reproduced in *The Bible in the Common Schools* (Robert Clark & Co. ed., 1870)). The Free Exercise Clause advances the command of government neutrality by securing "religious liberty in the *individual* by prohibiting any invasions thereof by civil authority" and protecting against the coercive effect of legislation "as it operates against him in the practice of his religion." *Schempp*, 374 U.S. at 223 (emphasis added); *see also Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378, 384 (1990); *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 996 (7th Cir. 2006). At a minimum, the Free Exercise Clause protects against laws that "discriminate[ ] against some or all religious beliefs." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

State action that offends the Free Exercise Clause must satisfy strict scrutiny, i.e., be narrowly tailored to serve a compelling state interest. *See Vision Church*, 468 F.3d at 996; *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 763 (7th Cir. 2003). Additionally, when a legislative classification offends a fundamental right, such as the Free Exercise Clause, an equal protection challenge to that classification is subject to strict scrutiny. *Vision Church*, 468 F.3d at 1000. A law offends the Free Exercise Clause and its requirement of government neutrality with respect to religion in two circumstances. First, a law that burdens the free exercise of religion and that is not facially neutral and of general applicability will be subject to strict scrutiny. *City of Hialeah*, 508 U.S. at 531-32; *Vision Church*, 468 F.3d at 996. Second, a facially-neutral law that "imposes a substantial burden on religion" offends the Free Exercise Clause and likewise is subject to strict scrutiny. *Vision Church*, 468 F.3d at 996. The OMA's amendment to the Illinois RFRA violates the Free Exercise Clause under either of these approaches.

A law is not neutral on its face if its object or purpose "is the suppression of religion *or religious conduct*." *City of Hialeah*, 508 U.S. at 533 (emphasis added). To determine whether a law is neutral and of general applicability, we first look to the text of the statute to determine whether it discriminates on its face. *Id.* "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from language or context." *Id.* Applying these standards, it is clear that the OMA's amendment to the Illinois

RFRA is not facially neutral. OMA added a new section 30 to the Illinois RFRA which reads:

> Nothing in this Act limits the authority of the City of Chicago to exercise its powers under the O'Hare Modernization Act for the purposes of relocation of cemeteries or the graves located therein.

775 ILCS 35/30. The panel opinion determines that, because cemeteries and the burial, or relocation, of the dead are not inherently religious, the amendment to the Illinois RFRA is textually neutral. However, this analysis fails to appreciate that, when read in context, the new section 30 of the Illinois RFRA affects only religious cemeteries. The phrase "this Act" in the new section 30 refers to the Illinois RFRA. *See id.* 35/1. The Illinois RFRA, in turn, protects against government actions that substantially burden an individual's free exercise of religion, *id.* 35/15, which the Illinois RFRA defines as "an act or refusal to act that is substantially motivated by religious belief, *id.* 35/5. Thus, the *only* cemeteries affected by OMA's amendment to the Illinois RFRA are those *religious* cemeteries that the City may seek to relocate. Moreover, because the Illinois RFRA's protections apply only where the government action substantially burdens an individual's free exercise of religion, the amendment affects only those religious cemeteries whose relocation would substantially burden an individual's free exercise of religion.

The effect of the amendment is to remove from the protections afforded to every other individual's

religious observance, those individuals whose religious practices would be substantially burdened by the relocation of cemeteries in connection with the expansion of O'Hare. The OMA amendment to the Illinois RFRA offends the Free Exercise Clause by penalizing those individuals whose religious observance is affected by the expansion project by denying them "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988). Illinois RFRA demands that the government show a compelling interest and the lack of viable alternative before it burdens anyone's religious beliefs. By the amendment, Illinois has watered down, significantly, the protection afforded these plaintiffs. It does not matter that Illinois has not chosen to single out the United Church of Christ (the faith with which St. John's is affiliated) for unfavorable treatment across the state. The Free Exercise Clause protects the *individual's* right to the free exercise of religion. *See Jimmy Swaggart Ministries*, 493 U.S. at 384; *Schempp*, 374 U.S. at 223. Thus, the OMA's amendment to the Illinois RFRA both burdens the free exercise of religion and lacks facial neutrality, and, therefore, strict scrutiny must be applied to the amendment.

However, even if the amendment to the OMA was facially neutral, it would still be subject to strict scrutiny because it imposes a substantial burden on religion. As the Supreme Court said in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993):

> Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality," *Gillette v. United States*, 401 U.S. 437, 452 (1971) and "covert suppression of particular religious beliefs," *Bowen v. Roy*, *supra*, at 702 (opinion of Burger, C.J.). Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.

See also Vision Church, 468 F.3d at 996. We have held that a burden on the free exercise of religion rises to the level of a constitutional injury when the law places significant pressure on the adherent to forego its religious precepts. *Id.* at 999. The effect of relocating St. Johannes on St. John's religious observance is neither hypothetical nor speculative, but, rather, inescapable. The relocation of St. Johannes would force St. John's to forego its religious precepts regarding the burial of its members. This burden goes further than placing pressure on St. John's to forego its religious precepts. By relocating St. Johannes Cemetery, St. John's would be "coerced by the Government's action into violating [its] religious beliefs." *Lyng*, 485 U.S. at 449. By forcing St. John's to "perform acts undeniably at odds with fundamental tenets of [its] religious beliefs," this coercion presents the precise "danger to the free exercise of religion that the First Amendment was designed to prevent." *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

Because the amendments to the Illinois RFRA offend the Free Exercise Clause, the law must survive strict scrutiny under both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Under strict scrutiny review, the Government bears the burden of proving both that the act in question advances a compelling state interest and that the means chosen to pursue that interest are narrowly tailored to that end. *See Johnson v. California*, 543 U.S. 499, 505 (2005); *see also Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 646 (7th Cir. 2006); *Vision Church*, 468 F.3d at 996. The majority opinion accepts the City's assertions that the current modernization plan is narrowly tailored. Perhaps the City is correct. However, accepting the City's assertions at this stage in the litigation is inconsistent with our obligation when reviewing a motion to dismiss to accept all well pleaded facts as true and draw all reasonable inferences from those facts in favor of the plaintiffs. *Patel v. City of Chicago*, 383 F.3d 569, 572 (7th Cir. 2004). At this stage in the litigation, there has been none of the factual development necessary to determine whether the means chosen by the City are narrowly tailored to meet the compelling interest asserted here.

Therefore, I would remand the case for further proceedings to allow factual development. For these reasons, I respectfully dissent from the portion of the panel's opinion that rejects St. John's claim. I am pleased to join the opinion in all other respects.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ST. JOHN'S UNITED CHURCH OF CHRIST, an Illinois not-for-profit corporation; HELEN RUNGE; SHIRLEY STEELE; REST HAVEN CEMETERY ASSOCIATION, an Illinois not-for-profit corporation; ROBERT PLACEK; LEROY H. HEINRICH; VILLAGE OF BENSENVILLE, ILLINOIS, an Illinois municipal corporation; ROXANNE MITCHELL; and the VILLAGE OF ELK GROVE, ILLINOIS, an Illinois municipal corporation,

Plaintiffs,

v.

THE CITY OF CHICAGO, an Illinois municipal corporation; RICHARD M. DALEY, Mayor of the City of Chicago; FEDERAL AVIATION ADMINISTRATION; MARION C. BLAKEY, Administrator of the Federal Aviation Administration; the STATE OF ILLINOIS; and ROD R. BLAGOJEVICH, Governor of the State of Illinois.

Defendant.

No. 03 C 3726
HONORABLE DAVID H. COAR

MEMORANDUM OPINION AND ORDER

Before this Court is a host of motions filed by Plaintiffs and Defendants in this case, as well as their responses to this Court's rule to show cause.

Plaintiffs' motion to file a proposed second Amended Complaint is DENIED with respect to Counts I through X but GRANTED with respect to Count XI. Given that no unique counts remain in the first Amended Complaint that overcome the problems raised by this Court in its show cause order and in this opinion, Plaintiffs' first Amended Complaint is DISMISSED. The TRO is VACATED. Based on the actions in this opinion, Plaintiff's motion for a preliminary injunction is DENIED as MOOT.

Factual and Procedural Background[1]

This case is one skirmish in a series of battles between those who support the expansion of O'Hare International Airport and those who do not. At the inception of this litigation, plaintiffs included the villages of Elk Grove and Bensenville ("the Municipal Plaintiffs"); St. John's United Church of Christ and two parishioners named Shirley Steele and Helen Runge ("the St. John's Plaintiffs"); and Rest Haven Cemetery Association and two members of its board of directors

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[1] For the purpose of this opinion, all facts alleged by Plaintiffs in their proposed Seconded Amended Complaint are assumed to be true. This Court also takes judicial notice of the proceedings in *Village of Bensenville et al. v. FAA*, No. 5-1383 (D.C. Cir. filed Sept. 30, 2005).

Leroy Heinrich and Robert Placed ("the Rest Haven Plaintiffs"). These plaintiffs sued the City of Chicago ("City" or "Chicago") and Mayor Richard M. Daley; the State of Illinois and Governor Rod R. Blagojevich; and the Federal Aviation Administration and Administrator Marion Blakey (collectively referred to as "FAA") based on allegations arising from the Defendant's involvement in plans to expand O'Hare. Plaintiffs alleged that the City planned to build runways on land currently located in Bensenville and Elk Grove, including land currently used by St. Johannes Cemetery, the cemetery affiliated with St. John's, and land used by Rest Haven Cemetery.

This is not, of course, the first time that critics have opposed expansion of O'Hare. Nor is this the first time that Bensenville and Elk Grove Village have filed suit to ward off expansion. In 1974, for example, the two municipalities were part of a group called the Suburban O'Hare Commission ("Suburban") that intervened in litigation alleging that the FAA had violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, et seq. by adopting a policy of unlimited growth at O'Hare. *See Suburban O'Hare Comm'n et al. v. Dole*, 787 F.2d 186, 188-89 (7th Cir. 1986) (citing *State of Illinois ex rel. Scott v. Butterfield*, No. 74-2440 (N.D. Ill. 1974). The litigation ended on October 15, 1982, when the FAA, the City, and Suburban entered into a consent decree that governed the future growth of O'Hare. *Id.*

Roughly two years later, Suburban filed a separate suit against the FAA and the City in district court, alleging that the approval of a proposed airport layout

plan (or "ALP") violated the consent decree; NEPA; the Airway and Airport Improvement Act ("AAIA"), and the Clean Air Act, 42 U.S.C. §§7401 et seq. *Id.* at 192. Prior to the district court's dismissal of the suit, Suburban filed a petition for review in the Seventh Circuit. Suburban argued at the time that the FAA's order approving the ALP could only be reviewed in district court. The Seventh Circuit disagreed, finding exclusive jurisdiction in the courts of appeals. *See id.* at 195.

The current litigation stems from Chicago's most recent efforts to expand O'Hare; efforts that compose what Mayor Daley termed the "O'Hare Modernization Project" ("OMP"). The OMP, made public in July 2001, includes plans for building new runways. In a attempt to garner support for the OMP, Chicago claimed that by building new runways, it could more than double O'Hare's capacity for boarding passengers and reduce flight delays by 79% overall. These and other claims regarding the OMP were based on material affirmative misstatements and knowing omissions or concealment of facts.

When he announced his plans for O'Hare expansion, the Mayor noted that it would be necessary for the City to acquire land in Elk Grove Village and Bensenville—including St. Johannes Cemetery land and Rest Haven Cemetery land—so that the new runways could be constructed. In June 2002, Chicago announced that it would begin efforts to acquire several parcels of land in Elk Grove and Bensenville, including homes, businesses, park land, and St. Johannes and Resthaven. In response, the municipalities filed suit in

state court. They requested an injunction barring Chicago from proceeding with the acquisition before obtaining a "certificate of approval" from the Illinois Department of Transportation ("IDOT") pursuant to 620 ILCS 5/47. In support of their request, they argued that any ultimate decision to protect parcels of land from acquisition would be meaningless if acquisition and demolition had already occurred. On July 9, 2002, an Illinois Circuit Court enjoined Chicago from taking any steps to acquire any property in the two municipalities unless it first obtained a certificate of approval from DOT. The decision was affirmed by the Illinois Appellate Court in *Philip v. Daley*, 790 N.E.2d 961 (Ill.App.Ct. 2003).

According to Plaintiffs, Chicago "clearly did not like" the state laws that enabled Plaintiffs to receive an injunction. It requested that the Illinois General Assembly pass the O'Hare Modernization Act (the "OMA"), which amended the Illinois Religious Freedom Restoration Act to state that "[n]othing in this act limits the authority of the City of Chicago to exercise its powers under the O'Hare Modernization Act for the purposes of relocation of cemeteries or the graves located therein." The legislature complied with the request and passed the OMA in May 2003.[2] The City of Chicago also requested FAA approval of its proposed "airport layout plan" ("ALP"), pursuant to 49 U.S.C.

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[2] Plaintiffs allege that Governor Blagojevich signed the law on August 6, 2003.

§47107(a)(16).[3]

In response to the enactment of the OMA, the Municipal Plaintiffs, the St. John's Plaintiffs, and the Rest Haven Plaintiffs filed suit in this Court on May 30, 2003. They originally filed suit against the City and Mayor Daley, the state and Governor Rod Blagojevich, and the FAA and administrator Marion Blakey. Plaintiffs then filed an amended 21-count amended complaint on June 19, 2003. Many of their claims hinged on the fact that Chicago was proposing to acquire the land before the FAA had issued an Environmental Impact Statement or a Record of Decision.

In the amended complaint, all the named plaintiffs alleged that Chicago and Mayor Daley had violated NEPA and its implementing regulations; the National Historic Preservation Act (NHPA), 16 U.S.C. §470 et seq. and its implementing regulations; and §4(f) of the Department of Transportation Act, 49 U.S.C. §303(c). They also claimed that by allowing violations of those statutes, the FAA and Blakey had violated the Administrative Procedures Act, 5 U.S.C. §706.

In addition to those claims, the St. John's and Rest Haven Plaintiffs filed several claims based on religion. Against the City and Mayor Daley, they alleged

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[3] The FAA's approval of an ALP constitutes a finding that the ALP is eligible for federal funding. *City of Cleveland, Ohio v. City of Brook Park Ohio*, 893 F.Supp. 742, (N.D.Ohio, 1995) (citing *City of Grapevine, Tex. v. Department of Transportation*, 17 F.3d 1502, 1503 (D.C.Cir. 1994) and *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 197 (D.C.Cir. 1991)).

violations of the Free Exercise Clause of the First Amendment of the United States Constitution (both for targeting Plaintiffs and for placing a substantial burden on Plaintiffs' religious beliefs and practices—see Counts IV and XII); violations of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution (both for discriminating against Plaintiffs and for hiding data that had been shared with other parties—see Counts XVIII and XXI); violations of the Fifth Amendment Takings Clause of the United States Constitution (see Count XX); and violations of the Due Process Clause (see Count XX). These plaintiffs also alleged that Chicago and Mayor Daley violated RLUIPA (see Count VIII).

As for the FAA and Blakey, the St. John's and Rest Haven Plaintiffs alleged that the federal defendants violated the Free Exercise Clause (see count XVI); the Due Process Clause and the Equal Protection Clause (see Count XXI); and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §2000bb et seq. (Count XVI).

The St. John's and Rest Haven Plaintiffs also alleged that the State of Illinois and Governor Blagojevich violated the Free Exercise Clause (see Counts VI and XII); the Equal Protection Clause (see Count XIX); and RLUIPA, 42 U.S.C. §2000cc et seq.(see Count X).

On July 10, 2003, the parties entered into an agreed order stating that "The City of Chicago agrees that City voluntarily agrees that it will not acquire property in the Village of Bensenville and Elk Grove Village for the OMP, or acquire Rest Haven or St. Johannes

Cemeteries, unless and until the FAA has issued a Record of Decision following completion of an EIS [environmental impact statement] for the OMP."

Sometime after December 2003, Chicago sought FAA approval and authorization for over $1.3 billion in federal funding for the portion of the OMP termed "Phase One," including approximately $300 million in "airport improvement program" ("AIP") discretionary funds, $63 million in entitlement funds, and an excess of $1 billion in Passenger Facility Charge ("PFC") funds.

In January 2005, the FAA announced that it would prepare a single environmental impact statement—a document required by NEPA—to accompany both the request for ALP approval and the request for funding. The EIS serves as a basis for the FAA's eventual "Record of Decision" ("ROD") on a specific topic.

In late July 2005, the FAA issued its final EIS. In that document, the FAA compared the environmental impact of Chicago's proposal with other alternatives. The FAA concluded that the alternative proposed by Chicago—with some refinement—was the preferred alternative. The EIS included a comprehensive review of the legal issues raised by the St. John's Plaintiffs and Rest Haven Plaintiffs. The FAA noted that if the preferred alternative and refinements were approved in the ROD and the City decided to implement the revised proposal with the aid of federal funding, St. Johannes would be relocated while Rest Haven would not.

On September 30, 2005, the FAA issued a ROD

granting Chicago's request for ALP approval. In the ROD, the FAA went through an extensive analysis of the claims related to religion filed by the St. John's Plaintiffs and the Rest Haven Plaintiffs. The agency noted that it had hoped at the beginning its review of the ALP that the "difficult and sensitive issues involving potential cemetery relocation could be resolved in a collaborative and consensual manner," but after "extensive correspondence, a succession of meetings, and pending litigation, the FAA clearly understands that there remains strong opposition by the religious objectors to relocation of graves from St. Johannes Cemetery and preservation of Rest Haven Cemetery as proposed in the Final EIS." ROD at 91. The FAA reviewed the RFRA claims and concluded that while the acquisition and relocation of St. Johannes Cemetery was likely to substantially burden the exercise of religion, there was a compelling government interest in taking immediate federal action to addresses the aviation needs of the Chicago region by reducing delays at O'Hare.[4]

That same day, the Municipal Plaintiffs and the St. John's Plaintiffs filed suit in the District of Columbia Court of Appeals, pursuant to 49 U.S.C. §46110. As part of that litigation, Plaintiffs filed a

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[4] In the EIS, the FAA noted that in 2003, a total of one-third of the delays for the twenty most delayed airports in the National Airport System occurred at O'Hare and that O'Hare's share of delays was at least twice those experienced by Atlanta or Newark, the next most delayed airports. This Court does not cite these claims by the FAA as established fact but rather includes them in order to provide some background on the ROD process.

Petition for Review of the FAA's July 25, 2005 EIS and the FAA's September 30, 2005 ROD. In that petition, Plaintiffs alleged that the FAA's approval of the ALP violated, *inter alia*, the First and Fifth Amendments and Article III of the Constitution; RFRA.; NEPA; Chapter 471 of Title 49 of the U.S. Code, Section 4(f) of the Department of Transportation Act, 49 U.S.C. §303(c); Section 6(f) of the Interior Land and Water Conservation Fund Act, 16 U.S.C. §4601-8(f)(3); Section 106 of the NHPA, 16 U.S.C. 470(f); and section 176(c) of the Clean Air Act, 42 U.S.C. §7506(c).

Along with the Petition, the Municipal Plaintiffs and the St. John's Plaintiffs also filed an emergency motion for a stay pending appeal and a motion for an administrative stay pending resolution of Petitioner's motion for a stay pending appeal. That day, the latter was granted so that the Court of Appeals would have sufficient opportunity to consider the emergency motion for stay pending appeal. The petitioners argued in the emergency motion for stay pending appeal that they were likely to succeed on the merits of their appeal because the FAA' s action in issuing an ROD that approved of the City's ALP violated RFRA and because the ROD did not address funding issues. The FAA responded. Chicago was permitted to intervene in the suit.

In light of the FAA's approval of the City's ALP and the ensuing litigation in the D.C. Circuit, this Court issued an order to show cause as to why all but four of the counts in the First Amended Complaint should be dismissed. The four counts not subject to the show cause order were: Count IV, a §1983 claim against the

City for imposing a substantial burden on the St. John's Plaintiffs in violation of the Free Exercise clause; Count VIII, a §1983 claim against Chicago for violating the St. John's Plaintiffs' rights under RLUIPA; Count XII, §1983 claim against the City for targeting the St. John's Plaintiffs in violation of the Free Exercise clause; and Count XVIII, a §1983 claim against the City for discriminating against St. John's Plaintiffs in violation of the Equal Protection clause. In the memorandum accompanying the order, this Court raised concerns about exercising any jurisdiction over the FAA in light of 49 U.S. §46110, and the fact that all parties appeared to be litigating identical issues in both the D.C. Circuit and in the Northern District of Illinois. All parties filed responses. Plaintiffs' responses repeatedly made reference to a second amended complaint they planned to seek leave to file.

On October 7, 2005, the FAA advised the United States Court of Appeals for the D.C. Circuit that it intended to award Chicago the requested $363 million in AIP discretionary funds for phase one of O'Hare development ("Phase One") in early November 2005, but had not yet made a substantive decision granting Chicago's request. The FAA argued that without a final decision on funding, the Court of Appeals did not have subject matter jurisdiction over claims concerning NEPA and RFRA compliance. To the best of this Court's knowledge, the FAA has not yet issued a funding decision.

On October 25, 2005, the D.C. Circuit denied the emergency motion for a stay pending appeal. In its

one-page denial, the appellate court stated that Plaintiffs had not "demonstrated the irreparable injury or likelihood of success on the merits required for the issuance of a stay pending review." *Village of Bensenville et al. v. FAA*, No. 5-1383, 2005 U.S.App.Lexis, 23277 (D.C. Cir. October 25, 2005.) In its denial, the D.C. Circuit did not expressly answer the question as to whether it had jurisdiction over the funding issues prior to a final FAA decision on funding.

The next day, the Municipal and St. John's Plaintiffs returned to this Court, where they filed a motion for leave to file a second amended complaint, a motion for a temporary restraining order, and a motion for a preliminary injunction.[5]

In their proposed Second Amended Complaint, Plaintiffs allege violations of RFRA (Count VII); NEPA; Section 4(f) of the Department of Transportation Act; Section 106 of the NHPA; Section 509 of the AAIA (Count VIII); Article III of the United States Constitution and the Due Process Clause of the United States Constitution (Count X). They take issue with

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[5] The proposed Second Amended Complaint does not include either the Rest Haven Plaintiffs or Mayor Daley as parties to the litigation. For the sake of simplicity, when referring to the proposed Second Amended Complaint, this Court will use the term "Plaintiffs" to refer to St. John's Plaintiffs and the Municipal Plaintiffs, This Court will use the same approach with respect to the term "Defendants" which originally included a reference to Mayor Daley, the State of Illinois, and Governor Blagojevich but does not do so with respect to the proposed Second Amended Complaint.

the process the FAA has used for disseminating information with respect to the O'Hare expansion and so allege a violation of the Freedom of Information Act (Count XI). In addition, the St. John's Plaintiffs allege FAA violations of their rights under the Free Exercise Clause of the First Amendment of the United States Constitution (Count II), the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution (Count IV), and the RLUIPA (Count VI). The St. John's Plaintiffs also allege that they have a right to have contested issues of facts relating to their RFRA claim tried in an Article III court (Count IX).

After filing their motion to submit a second amended complaint in this court, the Plaintiffs returned to the D.C. Circuit where they filed a docketing statement of issues on October 31, 2005. In that non-binding statement, they submitted 14 different issues. Included were issues of whether the FAA was in violation of RFRA; NEPA; Section 4(f) of the Department of Transportation Act; Section 106 of the National Historic Preservation Act; the Due Process Clause; the Free Exercise Clause; Chapter 471 of Title 49 of the United States Code; Section 6(f) of the Department of the Interior Land and Water Conservation Fund Act, 16 U.S.C. §4601-8(f)(3); and Section 176(c) of the Clean Air Act, 42 U.S.C. §7506(c). They also submitted that the issues of whether the FAA improperly failed to rule on Chicago's funding applications, violated the Administrative Procedure Act by failing to provide Petitioners with a formal adjudicatory hearing to resolve their claims under RFRA and the First Amendment, and issued an

unlawful ROD were properly before the D.C. Circuit. In addition, Plaintiffs raised the question of whether their First Amendment and RFRA claims require *de novo* review of contested issues of fact and law by an Article III court.

Back in this Court, on November 3, 2005, the parties appeared for a motion hearing on Plaintiffs' motion to file a second Amended Complaint; Plaintiffs' motion for a temporary restraining order; and Plaintiffs' motion for a preliminary injunction. At that hearing, this Court granted the motion for a TRO until November 14, 2005 in order to review the proceeding in the D.C. Circuit. On November 14, 2005, this Court extended the TRO until November 16, 2005, and also continued the motion for leave to file a second Amended Complaint and the motion for a preliminary injunction. Also pending are motions to dismiss the amended complaint, filed by the City and Mayor Daley and the FAA and Administrator Blakey.

Standard of Review

Federal Rule of Civil Procedure 12(b)(1) requires a court to dismiss an action when it lacks subject matter jurisdiction. *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942, 946 (7th Cir.2003). When reviewing a motion to dismiss brought under Rule 12(b)(1), this court "must accept as true all well-pleaded factual allegations, and draw reasonable inferences in favor of the plaintiff." *Ezekiel v. Michel*, 66 F.3d 894, 897 (7th Cir.1995) (citing *Rueth v. United States Environmental Protection Agency*, 13 F.3d 227, 229 (7th Cir.1993)). The burden of proof, however, is

"on a 12(b)(1) issue is on the party asserting jurisdiction." *United Phosphorus, Ltd.*, 322 F.3d at 946. When determining subject matter jurisdiction, this court "may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Ezekiel,* 66 F.3d at 897 (*quoting Capitol Leasing Co. v. Federal Deposit Insurance Corp.*, 999 F.2d 188, 191 (7th Cir.1993)).

The purpose of a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the case. *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir.1990) (citation omitted). On a 12(b)(6) motion, the Court accepts all well-pleaded allegations in the plaintiff's complaint as true and views the allegations in the light most favorable to the plaintiff. *Bontkowski v. First National Bank of Cicero*, 998 F.2d 459, 461 (7th Cir.1993). The Court should not dismiss a complaint "unless it appears beyond all doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Federal Rule of Civil Procedure 15(a) provides that, in most instances, a party must seek leave of court to amend his complaint and instructs the courts to grant leave 'when justice so requires.' Fed. R. Civ. Proc. 15(a). "The terms of the rule, however, do not mandate that leave be granted in every case. In particular, a district court may deny a plaintiff leave to amend his complaint if 'there is undue

delay, bad faith [,] or dilatory motive . . . [or] undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment.'" *Park v. City of Chicago*, 297 F.3d 606, 612 (7th Cir. 2002) (*citing Ferguson v. Roberts*, 11 F.3d 696, 706 (7th Cir.1993)).

Analysis

This Court begins its analysis of the issues in this case by reviewing Plaintiffs' response to its rule to show cause motion. In the memorandum accompanying its rule to show cause, this Court noted that Rest Haven is no longer affected by the O'Hare Expansion Project. Plaintiffs do not contend, in their response to the rule to show cause, that Rest Haven will have to be relocated as a result of O'Hare Expansion. Instead, Plaintiffs' response states that this Court should either issue an enforceable order stating "(a) that Chicago will preserve and leave forever undisturbed the graves of the departed at Rest Haven; and (b) that Chicago will guarantee the Rest Haven plaintiffs continued access to the Rest Haven Cemetery" or proceed to judgment on the Amended Complaint.

There is no reason why it the Rest Haven Plaintiffs should not be dismissed from this litigation. The Rest Haven Plaintiffs were given full and fair opportunity to present arguments as to why they are in any way affected by proposed actions by the City and the FAA and failed to do so. Given the lack of a present dispute, this Court concludes that the Rest Haven Plaintiffs are not presently threatened with harm. Plaintiffs were

given ample opportunity to show that there is harm such that Article III standing requirements are satisfied, and failed to do so. Consequently, all counts of the First Amended Complaint brought by the Rest Haven Plaintiffs are dismissed with prejudice. The dismissal of Rest Haven Plaintiffs results in a dismissal of counts V, IX, XIII, XV, and XVII of the Amended Complaint in their entirety and a dismissal of counts I-III, XVIII, XX, and XXI of the Amended Complaint as they pertain to the Rest Haven Plaintiffs.

In the memorandum accompanying the rule to show cause this Court also requested that Plaintiffs show cause as to why Mayor Daley should not be dismissed from this litigation given that bringing suit against a municipal officer in his official capacity and suit against the municipality is duplicative. Rather than addressing the issue raised by the Court, Plaintiffs argue that they should be permitted to file suit at some point in the future against Mayor Daley in his personal capacity. The question of whether Mayor Daley can be sued in his personal capacity at a later point in time is irrelevant to a showing that he should not be dismissed from this suit where he is sued in his official capacity. The claims against Mayor Daley are duplicative of the claims against Chicago and so all claims against him are dismissed. *See Tabor v. City of Chicago*, 10 F.Supp.2d 988, 991 (N.D.Ill., 1998).

This Court also requested Plaintiffs show cause as to why counts intended to halt action before FAA approval were not moot in light of FAA approval and why this Court should exercise jurisdiction over claims brought against the FAA. Plaintiffs responded by

arguing that any problems related to the first Amended Complaint were resolved in the second amended complaint that they were proposing to file. Their response to the rule to show cause consistently refers to the proposed Second Amended Complaint, even with respect to the First Amendment, Fourteenth Amendment, and RLUIPA claims that were not the subject of the show cause order. Moreover, Plaintiffs specifically state in their response that "[i]n light of the motion to file the Second Amended Complaint, plaintiffs respectfully submit that the Court not dismiss the FAA from this case, but rather allow the filing of the Second Amended Complaint." Their decision to forego addressing this Court's concerns with respect to the first Amended Complaint, coupled with their request for permission to file a second amended complaint, indicate that Plaintiffs intend that this Court revisit the issues raised in the show cause order in light of their proposed Second Amended Complaint.

Because the Plaintiffs placed so much store on the proposed Second Amended Complaint in responding to the rule to show cause and because the Defendants argue that the proposed Second Amended Complaint is defective and leave to file it should be denied, this Court will address it first. Of course, if leave is granted, the Second Amended Complaint will supersede the Amended Complaint and any objections to the latter will be moot. As the law requires, for present purposes, the facts alleged in the proposed Second Amended Complaint will be taken as true.

Claims against Chicago

When reviewing the St. John's Plaintiffs' Free Exercise, Equal Protection, and RLUIPA claims, it is helpful to bear in mind what one court refers to as the "tug of war" between Supreme Court and Congress with respect to the review of governmental actions affecting religious actors. In 1990, the Supreme Court held in *Employment Division v. Smith*, 494 U.S. 872, 879 (1990) that the Free Exercise Clause does not grant religious actors a reprieve from compliance with neutral laws of general applicability. The Court refused to apply the balancing test employed in *Sherbert v. Verner*, 374 U.S. 398 (1963) which held that government actions that impose a substantial burden on religious practice must be justified by a compelling governmental interest. *See Smith*, 494 U.S. at 883-8. The Court concluded that *Sherbert* applied to the narrow issue of denial of unemployment and did not apply to neutral laws of general applicability. *See Smith* at 879.

Congress responded to *Smith* by enacting the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §2000bb et seq. The stated purpose of RFRA was to replace the neutrality test with the 'compelling interest test' as set forth in *Sherbert* and *Wisconsin v. Yoder*, 406 U.S. 205(1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened. 42 U.S.C. §2000bb(b)(1) & (a)(2). The Supreme Court then held that RFRA was unconstitutional as applied to the states. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). In response, Congress passed the Religious Land Use and

Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §2000cc et seq.. The language of RLUIPA, like that of the federal RFRA, opts to forgo the neutrality approach. But unlike RFRA, RLUIPA applies only to burdens that are imposed by land use regulations or are imposed by regulations relating to institutionalized persons.

This evolution is significant because with unless strict scrutiny is applied to their claims, the "less burdensome" analysis advocated by St. John's Plaintiffs does not apply to review of the actions of the City and the FAA.

St. John's Plaintiffs devote a significant amount of their complaints discussing how Chicago's actions do not survive strict scrutiny review because of violations of the Free Exercise Clause. What Plaintiffs fail to note, however, is current Supreme Court jurisprudence on the Free Exercise Clause does not require a court to apply strict scrutiny simply because a religious actor is involved. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *see also, Employment Div. Dept. Res. Of Oregon v. Smith*, 494 U.S. 872, 878 (1990). "A law that is neutral and of general applicability need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* The Seventh Circuit has explained, "no Free Exercise Clause violation results where a burden on religious exercise is the incidental effect of a neutral, generally applicable, and otherwise valid regulation, in which case such regulation need not be justified by a compelling governmental interest."

C.L.U.B. v. City of Chicago, 342 F.3d 752, 763 (7th Cir. 2003).

This Court begins with a review of Plaintiffs' claims in the proposed Second Amended Complaint. According to the proposed Second Amended Complaint, the St. John's Plaintiffs believe that they are entitled to relief because the City's actions in the passage of §30, the amendment to the Illinois RFRA, violate the Free Exercise Clause. As noted earlier, §30 states that "[n]othing in this Act [the Illinois RFRA] limits the authority of the City of Chicago to exercise its powers under the O'Hare Modernization Act for the purposes of relocation of cemeteries or graves located therein." 775 ILCS 35/30.

This Court fails to see why it should apply strict scrutiny when reviewing the City's actions with respect to the passage of §30. The Supreme Court noted in *Smith* that strict scrutiny applies only to laws that discriminate against religion. *Smith*, 494 U.S. at 885. There is no indication in the complaint that the object of the law "is to infringe upon or restrict practices *because* of their religious motivation." *See C.L.U.B.* at 763 (emphasis added); *see also City of Hialeah*, 508 U.S. at 532 (government action violates neutrality requirement if it "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."). Even assuming that Chicago is responsible the addition of §30 to the Illinois RFRA, the amendment does not single out St. Johannes or any other cemetery because of its religious affiliation. Furthermore, there is no indication that the government, in pursuit of the

legitimate interest of O'Hare expansion has selectively imposed burdens "only on conduct motivated by religious belief." *See Hialeah*, 508 U.S. at 532. The language of the amendment applies to any and all cemeteries that are in the path of O'Hare expansion, regardless of religious affiliation or lack thereof.

Moreover, none of the allegations in the complaint give rise to the inference that the facially neutral language masks more insidious underpinnings. In *City of Hialeah*, for example, Hialeah argued that the facially neutral ordinances outlawing slaughter of animals advanced the public's legitimate interest in protecting public health and preventing cruelty to animals. The Supreme Court determined that Hialeah's ordinances constituted a religious gerrymander intended to affect Santeria adherents but almost no others, in violation of the Free Exercise Clause. *Id.* at 536. Plaintiffs do not allege that Chicago wanted the legislature to pass §30 so that it could satisfy a goal of impeding the St. John's Plaintiffs religious practice by building runways over St. Johannes Cemetery. Nothing in the complaint supports the proposition that Chicago wants the St. Johannes land for any reason other than the reason that it wants all the other land within project boundaries: for the expansion of O'Hare Airport. The language brings the treatment of cemeteries in line with the treatment of all other land in the path of expansion.

Because is no indication that §30 discriminates against religion, this Court applies rational basis review to the City's actions. The actions of Chicago are

rationally related to the legitimate government objective of expanding and improving O'Hare. To be sure, the passage of §30 was an inartful way to anticipate (and head-off) attempts to use the Illinois RFRA to block O'Hare expansion. Nevertheless, it is clear that the provision was not enacted to single out cemeteries for invidious treatment, but rather to preclude the argument that any cemetery would be entitled to more favorable treatment than other properties in the path of O'Hare expansion.

In one of their briefs, Plaintiffs argue that the passage of the "Chicago sponsored" §30 and the "separate acts of "individualized assessment" towards St. Johannes either individually or collectively "trigger First Amendment Free Exercise protection." Plaintiffs appear to confuse the issue of individualized exemptions—an indication that the law is not neutral and generally applicable—with the concept of individualized assessments under RLUIPA. Regardless, they do not merit relief. As noted earlier, the law in question is neutral and generally applicable. No facts in the complaint give rise to an inference that "individualized exemptions from a general requirement are available." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 537 (1993). In *Church of Lukumi Babalu Aye*, for example, the legislation prohibited all religious slaughter of animals while providing exemptions for most non-religious slaughter of animals. In this case, by comparison, the proposed Second Amended Complaint does not give rise to the inference that there exists any procedure by which any individuals within the proposed acquisition area can

obtain exemptions from condemnation nor is there any indication that any individuals are exempt. *See C.L.U.B.*, 342 F.3d at 764 (rejecting "individualized exemption claim" when "no person, nor any nonconforming land use, is exempt" from ordinance in question.).

The concept of "individualized assessments" appears in the RLUIPA context. See 42 U.S.C. § 2000cc(a)(2)(C) ("the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved."). This Court need not get to the issue of whether Chicago will make individualized assessments in violation of RLUIPA, however, because RLUIPA does not apply.

Turning then, to RLUIPA, this Court concludes that it does not apply to the actions alleged in this case. The St. John's Plaintiffs claim, in Count V, that Chicago will violate RLUIPA if it acquires St. Johannes Cemetery without first demonstrating that it needs to acquire the land to accomplish a compelling governmental interest and that there is no alternative to accomplish the compelling governmental need which would not impose the burden on religious activity. The problem with this claim is that RLUIPA only applies to government actions that "impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person." 42 U.S.C. §2000cc. The term "land use regulation" is defined as

"a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land . . . ." 42 U.S.C. §2000cc-5(5). In this case the City is seeking to exercise eminent domain power. Nothing in the proposed Second Amended complaint leads to the inference that the City's authority to acquire the land stems from any zoning regulations or landmarking law (which is unsurprising given that the City makes no assessment of the land it seeks to condemn.)

The St. John's Plaintiffs argue that the City's actions—even without any allegations that they are taken pursuant to a zoning regulation or landmarking law—are subject to the heightened review of RLUIPA. In support, they cite they cite *Cottonwood Christian Center v. Cypress Development Agency*, 218 F.Supp.2d 1203 (C.D.Cal. 2002).[6] Plaintiffs contend that *Cottonwood* stands for the proposition that all exercises of eminent domain authority are subject to RLUIPA. This Court is not willing to take such an expansive view, nor does it believe that *Cottonwood* stands for such a sweeping proposition. While this Court may not

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[6] Plaintiffs also cite *Faith Temple Church v. Town of Brighton*, 2005 WL 66210 (W.D.N.Y. Jan. 12 2005). In *Faith Temple*, the District Court determined that it could not decide whether to grant the plaintiff's request for a preliminary injunction until it held a hearing on whether the Town's condemnation would violate RLUIPA. The court, rather than undertaking an analysis of whether RLUIPA applied, proceeded under the assumption that it did and ordered a hearing as to the merits of the plaintiffs' injunction request. The conclusory determination of a district court in another circuit is not binding authority nor, in this particular case, is it persuasive.

agree with the passing reference to eminent domain in *Cottonwood*, that case can be read to suggest that RLUIPA is applicable to the specific eminent domain actions where the condemnation proceeding is intertwined with other actions by the city involving zoning regulations.[7]

In one of the many briefs filed in this case, the St. John's Plaintiffs argue that the City's actions can be linked to zoning regulations because the City's proposed actions "imposes severe restrictions on St. John's use or development of St. Johannes." These restrictions, according to St. John's Plaintiffs, are attempts to regulate the land and so are an act of zoning. To call the acquisition of St. Johannes a restriction on St. John's use of the land, however, is more than mere understatement; it is, in fact, an incorrect classification of the actions at issue in this case. Chicago is not seeking to restrict the uses of St. John's—it is planning on acquiring the land pursuant to its eminent domain authority and then using it for the public purpose of expanding the airport. Land use regulations limit the use of property. Condemnation is, in one sense, the ultimate limitation

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[7] Defendants make much of the fact that in *Cottonwood* there was indication in the record that the municipality's exercise of eminent domain was taken pursuant to a resolution that itself was based on a zoning regulation. The district court stated, "[t]he Redevelopment Agency's authority to exercise eminent domain to contravene blight, as set forth in the Resolution of Necessity, is based on a zoning system developed by the City (the LART Plan)." *Id.* at 1221, fn. 7. This Court does not find the Cottonwood court's reasoning persuasive as it relates to such an attenuated relationship between eminent domain and zoning.

on the use of property. It does not follow, however, that condemnation is a land use regulation as this term is used in the statute. Congress could have included "takings" within the reach of RLUIPA but did not. This Court is no persuaded that it should construe the concept of zoning so broadly that any acquisition of land by the City pursuant to eminent domain proceedings is an act of zoning.

This Court is certainly cognizant of the RLUIPA admonition that "[t]his chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C.A. § 2000cc-3. It is important to note that this Court's holding that the City does not act pursuant to a zoning or landmarking law should not be taken to mean that all condemnation proceedings necessarily are outside the scope of RLUIPA. This Court expresses no opinion with respect to that conclusion.[8] The St. John's Plaintiffs' contention that all condemnation proceedings are land use regulations dealing with zoning, however, is not an attempt to construe the statute broadly but rather is an attempt to rewrite it. Again, as with their Free Exercise claim, St. John's Plaintiffs contend that they deserve more protection than the law provides. They fail to state a claim under RLUIPA.

The St. John's Plaintiffs also allege a violation of the

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[8] For example, an act to acquire land (through eminent domain) and then to rezone it and transfer it might very well fall with the reach of RLUIPA.

Equal Protection Clause of the Fourteenth Amendment of the United States Constitution on the basis of the City's violation of their fundamental right to the free exercise of religion. Similar to their arguments with Count I, St. John's Plaintiffs state that "Count III is based on the action of the Illinois Legislature in exempting—again at Defendant Chicago [sic] request—these two religious cemeteries from the protection of Illinois RFRA while preserving Illinois RFRA protection for every other religious institution (including all other religious cemeteries) in the State." As noted earlier, however, the text of the amendment to the Illinois RFRA and the facts alleged in the complaint do not suggest that Illinois RFRA protection has been stripped for only St. Johannes Cemetery: instead, the amendment states that any and all cemeteries (as well as other property) in the path of the O'Hare expansion are subject to acquisition pursuant to the O'Hare Modernization Act. "Where a plaintiff's First Amendment Free Exercise claim has failed, the Supreme Court has applied only rational basis scrutiny in its subsequent review of an equal protection fundamental right to religious free exercise claim based on the same facts." *Wirzburger v. Galvin*, 412 F.3d 271, 282-283 (1st Cir. 2005) (citations omitted). Given that Chicago's actions seeking to acquire land adjacent to O'Hare are rationally related to a legitimate government interest in expanding airport capacity, this Court finds no Equal Protection violation on this basis.

Plaintiffs' First Amended Complaint, currently pending before this Court, also fails to state a claim with respect to the St. John's Plaintiff's Free Exercise,

Equal Protection, and RLUIPA claims. Again, Plaintiffs fail to allege facts supporting an inference that Chicago's actions were anything but neutral and generally applicable. They also fail to suggest that a land use regulation caused them harm such that they have a claim under RLUIPA. And finally, they fail to allege facts supporting a conclusion that Chicago's conduct was not rationally related to a legitimate governmental interest as is required when raising an equal protection violation that is based on a failed Free Exercise Claim. *See Wirzburger*, 412 F.3d at 282-283 (citations omitted). Because of Plaintiffs' failure to state a claim with respect to these claims, Counts IV, VIII, XII, and XVIII of the Amended Complaint are all DISMISSED.

Claims Against the FAA and Blakey

The bulk of Plaintiffs' claims in the proposed Second Amended Complaint concern the FAA. As a threshold matter, it is necessary to determine whether this Court may exercise jurisdiction over those claims. As this Court noted in the memorandum accompanying its rule to show cause issued on October 12, 2005,the text of 49 U.S.C. §46110 limits district court review. According to the plain language of the statute, a person disclosing a substantial interest in an order issued by the Administrator of the FAA "in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of

business." 49 U.S.C. §46110(a).[9] The terms "this part" refer to the Air Commerce and Safety provisions ("Part A") of the Aviation Programs Subtitle of Title 49. See 49 U.S.C. §40101 et seq. The term "Part B" refers to the Airport Development and Noise provisions ("Part B") of that same Subtitle. See 49 U.S.C. §47101 et seq. Part B includes the provision which grants FAA the authority to approve ALPs. 49 U.S.C. § 47107(a)(16). The statute provides that the reviewing Court of Appeals "has *exclusive jurisdiction* to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings." 49 U.S.C. §46110(a)(emphasis added).

Plaintiffs seeking appellate court review need not only bring claims that refer to the specific statutory provision granting exclusive appellate jurisdiction; the fact that a plaintiff alleges violations of substantive laws that could otherwise be brought in district court does not defeat appellate court jurisdiction. For example, in *Gaunce v. De Vincentis*, 708 F.2d 1290 (7th Cir. 1983), the Seventh Circuit determined that the Court of Appeals retained exclusive jurisdiction over a challenge that was brought pursuant to both the

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[9] This procedure is also outlined in the FAA's ROD. In the "Right of Appeal" section of the ROD, the FAA states that "[t]his ROD presents the Federal Aviation Administration's final decision and approvals for the actions identified, including those taken under the provisions of 49 U.S.C. Subtitle VII, Parts A and B. This decision constitutes a final order of the Administrator subject to review by the Courts of Appeals of the United States in accordance with the provisions of 49 U.S.C. Section 46110."

Federal Aviation Act—which provided for review in the court of appeals—and the United States Constitution. *See Dole*, 787 F.2d at 192. Instead, "[m]ore broadly, statutes such as Section 46110(c) that vest judicial review of administrative orders exclusively in the courts of appeals also preclude district courts from hearing claims that are 'inescapably intertwined' with review of such orders. *Merritt I*, 187 F.3d at 271. A claim is inescapably intertwined in this manner if it alleges that the plaintiff was injured by such an order and that the court of appeals has authority to hear the claim on direct review of the agency order. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336, 339, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958)." *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 187 (2nd Cir. 2001). While litigants may seek, through careful pleading, to avoid the strict jurisdictional limits imposed by Congress, there is not reason to believe "that the jurisdictional remedy prescribed by Congress hangs on the ingenuity of the complaint." *California Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908, 912 (9th Cir. 1989).

As Seventh Circuit concluded in *Dole*, "[i]f there is any ambiguity as to whether jurisdiction lies with a district court or with a court of appeals we must resolve that ambiguity in favor of review by a court of appeals. If a decision of an administrative agency is based, in substantial part, on a statutory provision providing for exclusive review by a court of appeals, then the entire proceeding must be reviewed by a court of appeals." *Dole*, 787 F.2d at 192 -193.

The requirements of 49 U.S.C. §46110 should come as

no surprise to Plaintiffs. After all, the Municipal Plaintiffs and the St. John's Plaintiffs (collectively referred to as ("Petitioners") filed a petition for review pursuant to U.S.C. 49 U.S.C. §46110(a) on September 30, 2005 in the District of Columbia Court of Appeals. In that petition, the Petitioners alleged, *inter alia*, that the FAA's actions violate the First and Fifth Amendments and Article III of the Constitution, RFRA, NEPA, Chapter 471 of Title 49 of the United States Code, Section 4(f) of the Department of Transportation Act, Section 6(f) of the Department of the Interior Land and Water Conservation Fund Act, Section 106 of the NHPA, and Section 176(c) of the Clean Air Act. That same day they filed an emergency motion for a stay pending appeal which was granted and a motion for an administrative stay which was eventually denied.

Plaintiffs elaborated on the issues before the D.C. Circuit in their appellate court docketing statement. In that non-binding statement they submitted 14 different issues to the D.C. Court of Appeals. Several of those issues reappear in the same or slightly altered form in Plaintiff's proposed Second Amended Complaint.

This Court lacks subject matter jurisdiction over some of these claims. For example, Counts VII, IX, and X of Plaintiffs' proposed Second Amended Complaint are all based on allegations of shortcomings with the ROD and the FAA's approval process for the ALP.

In Count VII, the St. John's Plaintiffs allege that the FAA violated RFRA when it approved the City's ALP.

The St. John's Plaintiffs state in the RFRA claim found in the proposed Second Amended Complaint that the matter "is currently before the United States Court of Appeals for the District of Columbia" and that the St. John's Plaintiffs "have filed this RFRA Count in this Court as a matter of protective jurisdiction to ensure that their federal RFRA claim is not deemed waived." They ask Court to "defer ruling on [the] claim that they are entitled to an Article III tribunal on the contested issues of fact relating to RFRA compliance until the United States Court of Appeals has ruled on that issue." Plaintiffs claim they make this request in the hopes that they can return to this Court with their RFRA claim should the D.C. Court of Appeals determine that disputed issues of RFRA compliance should be tried in an Article III district court. This Court does not believe that it is proper for it to retain jurisdiction on the basis of this argument. Nothing in the statute leads this Court to the conclusion that Congress intended for district courts to remain "on call" with respect to disputed factual issues that surface during appellate court review of an agency's approval of an airport layout plan.

Counts IX and X also relate to questions about the ALP approval process. In Count IX, Plaintiffs allege they have a right to have contested issues of fact related to their RFRA claims tried and determined by an Article III Court instead of the FAA pursuant to its ALP approval process and in Count X, Plaintiffs allege that the FAA violated the Due Process Clause and Article III by serving as an adjudicatory tribunal in ALP approval process. Plaintiff's request that Count X

be stayed is denied: there is no reason for this Court to stay a count over which it does not have jurisdiction. Given Plaintiffs failure to provide this Court with any logical basis for concluding that 49 U.S.C. §46110(a) does not preclude it from exercising jurisdiction over these claims, Plaintiff's request to file a proposed Second Amended Complaint is denied with respect to Counts VII, IX, and X.[10]

Some claims Plaintiff propose are inescapably intertwined with the ROD and therefore are subject to review in the D.C. Circuit. After reading the parties' submissions and holding oral argument, it has become clear to this Court that Plaintiffs intend to concurrently litigate the issue of agency funding in

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[10] Their reticence is somewhat puzzling in light of the fact that this Court has repeatedly raised the issue of subject matter jurisdiction—including the specific question of the impact of 49 U.S.C. §46110 on this Court's ability to entertain Plaintiffs' claims—with Plaintiffs. At one point in the voluminous briefing in this case, Plaintiffs suggested that jurisdiction for judicial review of the FAA's actions with respect to Airport Layout Plan approvals is in the district court. In support, Plaintiffs cited to two cases where appellate courts found no jurisdiction to review directly an FAA order approving an airport layout plan based on the language found in an older version of the statute. *See Committee to Stop Airport Expansion v. FAA*, 320 F.3d 285, 288 (2nd Cir. 2003) and *City of Alameda v. FAA*, 285 F.3d 1143, 1145 (9th Cir. 2002). As the FAA correctly notes, the version of the statute cited in those cases has been superceded by a more inclusive version. On December 12, 2003, Congress modified the statute by providing that the Courts of Appeals have exclusive jurisdiction over orders that are issued "in whole or *in part* under this part [part A], *part B*, or subsection (l) or (s) of section 114". 49 U.S.C. §46110(a) (emphasis added).

both this Court and the D.C. Circuit. In both forums, Plaintiffs focus on the relationship between funding under the Aviation Act and violations of federal laws such as NEPA. In the D.C. Circuit, they take issue with the agency for issuing a ROD that approved of the ALP but did not make any funding determinations. They argue that [t]hat short-sighted and disjointed decision-making process is barred by the NEPA regulations" as well as the AAIA. In this Court, they argue that by allowing Chicago to proceed with acquisition before it makes its funding decision, the FAA is violating NEPA and a host of other federal statutes and regulations including the AAIA. In both courts they argued that acquisition without funding raised particular dangers for plaintiffs who stand to lose lands hastily acquired by Chicago without FAA guarantee of funding.

The arguments Plaintiffs raise in this Court with respect to the FAA's actions allowing Chicago to acquire land before the issuance of a funding decisions by their nature require attention to the issues currently before the D.C. Circuit where Plaintiffs raise arguments dealing with the FAA's failure to issue a funding decision with its ROD that approved Chicago's proposed ALP. Plaintiffs' challenge of agency procedures and reasoning—a challenge raised in this court—is "inescapably intertwined with a review of the procedures and merits surrounding the FAA's order." *See Merritt v. Shuttle Inc.*, 187 F.3d 263, 271 (2nd Cir. 1999). The review of procedures and merits is already underway in the D.C. Circuit.

The D.C. Circuit has issued one ruling in response to

a motion that raised the issue of funding and may find reason to issue other rulings on that topic. Deference to the D.C. Circuit requires that those issues not be decided in a piecemeal fashion by different courts. Rather than contributing to the confusion, and bearing in mind the statement in Dole that "[i]f there is any ambiguity as to whether jurisdiction lies with a district court or with a court of appeals we must resolve that ambiguity in favor of review by a court of appeals," this Court will deny Plaintiffs' leave to file claims related to FAA funding in this Court. See Dole, 787 F.2d at 192-193.

The St. John's Plaintiffs also raise a series of claims related to the FAA's *future* funding decisions with respect to the O'Hare Modernization Project. See Counts II (future funding will violate Free Exercise Clause), IV (future funding will violate the Equal Protection Clause), and VII in part (future funding will violate RFRA). With respect to all of these counts, Plaintiffs allege that the FAA and Blakey have "declared their intent" to provide Chicago with funding but do not allege that a final decision on the funding issue has been made. On November 11, 2003, Plaintiffs filed a motion to apprise this Court of the FAA's statement in the D.C. Circuit that it had not yet issued a final funding decision.

The decision to frame these claims in terms of future funding decisions appears to be an attempt to avoid the exclusive jurisdiction requirements of 49 U.S.C. §46110. After all, if the claims raised in this Court concerned the FAA's completed decisions on funding, this Court would not have jurisdiction to hear them.

See 49 USC §46110. Regardless, opting to frame the claims as not-yet-issued future decisions that will cause harm does not help Plaintiffs obtain district court review.[11] A mere allegation that the FAA intends to act a certain way in the future is not sufficient to gain relief in this Court.

Plaintiffs contend that if this Court does not entertain claims related to future funding issues, they will have no forum in which to present them. Plaintiffs are reminded that Article III does not guarantee litigants a forum where all perceived wrongs may be addressed at all times. In this case, there are legitimate reasons for refusing to issue relief for a decision that the agency has not yet made. Congress empowered the FAA to make funding decisions and limited review of those decisions to the courts of appeals. This Court will not upset that scheme simply because Plaintiffs are concerned that at some point in the future the FAA and Blakey will approve of funding to be used for O'Hare expansion. This Court will not issue orders predicated on guesses as to what the FAA will decide with respect to funding. The agency has not yet made a decision and so there is no guarantee what

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[11] In these claims, Plaintiffs also include conclusory legal statements regarding how FAA officials and personnel assisted Chicago in the various alleged violations "by making material misstatements of fact or engaging in material omissions of fact as to factual issues relating to the elements of compelling need and the availability of alternatives" under the First Amendment Clause (Counts II and VI), and the "strict scrutiny Equal Protection analysis" (Count IV). Be that as it may, these claims are best reviewed in the D.C. Circuit, as they are inescapably intertwined with the FAA's issuance of the ROD.

that decision will be.

Plaintiffs counter that they should be able to file suit here because under *Old Town Neighborhood Ass'n v. Kauffman*, 333 F.3d 732 (7th Cir,. 2003), a district court has jurisdiction to review claims that stem from a defendant's provision of assistance to a local government that then uses the funding to perpetrate violations of federal constitutional and statutory rights. In *Old Town*, however, there was no indication that the courts of appeals had exclusive jurisdiction with respect to orders issued by the federal agency. The district court had no qualms about proceeding with judgment, nor did the Seventh Circuit contend that the district court should have refrained from acting because of a lack of subject matter jurisdiction. Nor was there any indication in *Old Town* that the plaintiffs had filed suit in both district and appellate court with the uniform goal of stopping the acquisition of land.[12]

Count VI of Plaintiffs' proposed Second Amended Complaint alleges that the FAA will violate RLUIPA by providing funding for Phase One of the OMP. Like Counts II, IV, and part of VII, it is not ripe. Moreover, as with other claims, 49 U.S.C. §46110 indicates that the proper forum for the presentation of this claim when it is ripe is the D.C. Circuit.

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[12] What's more, in *Old Town* the Plaintiffs had shown that there was a substantial likelihood that Defendants were going to violate federal law. Plaintiffs have failed to do so in this case. They allege that Defendants will violate the law by funding Chicago's violations.

As for the claims alleged against the FAA in Plaintiff's Amended Complaint, none of them survive this Court's rule to show cause. The counts were all filed in response to the threat that Chicago would seek to acquire the land before the FAA had completed its various analyses of the St. John's Plaintiffs religious claims and before the FAA had issued an ROD approving the ALP. Consequently, they are all now moot. The St. John's Plaintiffs have filed revised versions of some of these claims in the D.C. Circuit. The last claim of the Amended Complaint has been superseded by the sole claim that now constitutes the Second Amended Complaint.

That sole viable claim is Plaintiffs' FOIA claim. In Count XI of the proposes Second Amended Complaint, Plaintiffs argue that the FAA has hidden several thousand documents, including many documents that "are relevant to [St. John's] Plaintiffs' claims under the First Amendment, RLUIPA, and RFRA, and all the Plaintiffs' claims under NEPA, related statutes and the AAIA." The FAA Defendants argue that Plaintiffs' FOIA claim is simply an attempt to indirectly attack the administrative record that is currently before the D.C. Circuit. While FOIA is not a discovery tool and the statute was not intended to facilitate civil discovery, this Court cannot conclude that Plaintiffs have failed to allege a valid FOIA claim. Furthermore, it appears that Plaintiffs may not file their FOIA claim in the D.C. Circuit because the FOIA statute grants jurisdiction for filing claims in the district courts. 5 U.S.C. §552(g)(1). Plaintiffs are therefore granted leave to file their proposed Second Amended Complaint

as it relates to Count XI and Count XI only.

Conclusion

Plaintiffs' motion to file a proposed second Amended Complaint is DENIED with respect to Counts I through X but GRANTED with respect to Count XI. Given that no unique counts remain in the first Amended Complaint that overcome the problems raised by this Court in its show cause order and in this opinion, Plaintiffs' first Amended Complaint is DISMISSED. The TRO is VACATED. Based on the actions in this opinion, Plaintiff's motion for a preliminary injunction is DENIED as MOOT.

At the conclusion of this case, this Court is reminded of the Seventh Circuit's ending to an airport expansion case. The Court of Appeals remarked, "Petitioners conceive of themselves as the innocent, passive victims of a relentlessly expansive O'Hare. They point out that many of the communities surrounding O'Hare were established long before the airport had been built. In all fairness, however, these same communities receive enormous economic benefits from their proximity to O'Hare. Moreover, many of these communities have resisted attempts by the City to harmonize their own land-use regulations with the aviation activity at O'Hare. In a perfect world, petitioners would be able to reap the benefits of their location and still be able to sleep without noise disturbances at night. Unfortunately, the FAA and the City are forced to operate in a world where even their most carefully considered decisions are likely to adversely affect some people." *Dole*, 787 F.2d at 200 (7th Cir.1986). Simply

because there is adverse effect, however, does not mean that expansion must be halted.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 4, 2007

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

No. 05-4418
Consolidated with Nos. 05-4450 and 05-4451

ST. JOHN'S UNITED CHURCH OF CHRIST, an Illinois not-for-profit corporation, HELEN RUNGE, and SHIRLEY STEELE,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO, an

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 03 C 3726

David H. Coar, *Judge.*

Illinois municipal corporation, FEDERAL AVIATION ADMINISTRATION, and MARION C. BLAKEY, Administrator of the Federal Aviation Administration,

Defendants-Appellees.

ORDER

Plaintiffs-Appellants filed a petition for rehearing and rehearing *en banc* on October 26, 2007. No judge[1] in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to DENY rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing and petition for rehearing *en banc* are DENIED.

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[1] Judge Ilana Diamond Rovner took no part in the consideration of this matter.